



London Printed, for John Bellinger, and John Walthoe



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LONDON Printed for John Bellinger and John Waldhoe



DE ^o#
Jure Maritimo
ET
NAVALI:
OR, A
TREATISE
OF
Affairs Maritime
AND OF
Commerce.

In Three Books.

The Fourth Edition Enlarged.

By *Charles Molloy* Barrister at Law.

L O N D O N,

Printed, and are to be sold by *Abel Swalle* at the *Unicorn*
at the *West End* of *St. Paul's Church-yard*, 1690.

FEB 8 1913

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To the Right Honourable

LAWRENCE Viscount *Hyde* of *Kenellworth*, Baron of *Wooten Bassett*, Premier Commissioner of the Treasury, Gentleman of His Majesty's Bed-Chamber, and one of the Lords of His Majesty's most Honourable Privy Council.

And to the Right Honourable

DANIEL Lord *Finch* Premier Commissioner for Executing the Office of Lord High Admiral of *England*, and one of His Majesty's most Honourable Privy Council.

My Lords,

I Know it is a thing Sacred to write either of *Laws* or *Histories*, they not being to be touched or medled, but with an upright mind and undefiled hands ; (and for that cause their Repositories of Old were always in the Sacred Treasuries of Princes, or in the secret recesses of Temples, as the most undoubted securities of those that went
a 2 before,

before, and the firmest Guarantees of them that should
succeed) yet to Eternize (though not with that perfection)
the humblest of my Service to Your Lordships, have I pre-
sumed to compile and consecrate this Naval Tract of the
Laws to your Noble Protection: The consideration of your
eminent Virtues, not only by descent from those great Pillars
of Empire and Loyalty, your Predecessors; but your most
incomparable and indefatigable Industry and Knowledge in
matters Publick, hath rendred you not only serviceable to
the Crown, but truly esteemed in the hearts of every good
and upright man: This Nation now reaping the mighty ad-
vantages under your Influence, in reference to Commerce and
Navigation, which she hath so many Ages laboured for.

Vouchsafe, best of Friends, to the best of Kings, and
Good of his People, the Acceptance of this rude Sea-Skiff
from the meanest of your Servants, who, though deficient
in every thing that might contribute to the perfection of a
Piece fit for so Noble a Favour; yet wants he not a heart
to let the World know he is,

MY LORDS,

Your Lordships

Most humble Servant

Charles Molloy

THE Wisdom of God is highly to be admired, who hath not endowed the other living Creatures with that Sovereign Perfection of *Wisdom*, but hath secured and provided for them by natural Muniments from assault and peril and other necessities: But to Man, he formed him naked and frail, because of furnishing him with Wisdom, Understanding, Memory, and Sense to govern his Actions, endowing him with that pious affection of desiring Society, whereby one is inclined to defend, love, cherish, and afford mutual aid to each other: Nor hath he in no less wonderful manner (infinitely transcending all humane wisdom and understanding) created the material World to be subservient to his Being and Well-being: Yet without humane Understanding and Reason did he not build a Ship, raise a Fort, make Bread or Cloeth; but these came to pass only by humane Arts and Industry, in which by the Revolutions of the Celestial Bodies, Times and Seasons, Materials and other necessities are brought forth, by the alteration of which men in their proper seasons reap the fruits of their labour; so that there is no Society, *Nation, Country or Kingdom but stands in need of another: hence it is that men knowing each others necessities, are invited to *Traffick* and *Commerce* in the different parts and immensities of this vast World to supply each others necessities, and adorn the conveniences of humane life.

Lactantius,
lib. 9.

* *Seneca 4. de*
Beneficiis, cap.
18.

And as God hath so ordered this wonderful dependence of his Creatures on each other, so hath he by a Law immutable provided a Rule for Men in all their actions, obliging each other to the per-

* *Leg. ut vim.*
D. de just. &
lib. n. 7, & 8

formance of that which is right, not only to Justice *, but likewise to all other Moral Vertues; the which is no more but the dictate of right Reason founded in the Soul of Man, shewing the necessity to be in some act by its convenience and inconvenience in the rational Nature in Man, and consequently that it is either forbidden or commanded by the Author of Nature, who is the Eternal Creator of all things. And as God hath imprinted this universal Law in the minds of all men, so hath he given men power (society being admitted) to establish other Laws which proceed from the will, the which is drawn from the Civil Power, that is, from him or them that rule the Commonwealth or Society of Freemen united for their common benefit, (which is called the *Laws of Nations*) and which by the will of all or many Nations, hath received force to oblige; and is || proved by a continued use and testimony of Authentick Memorials of Learned or Skillful Men.

|| *Vasquez 2.*
Controv. 54. 4.

* *Florentinus 3.*
Jart. tit. 22.
sec. 5.
Leg. Servus D.
de Serv. export.
|| *Cicero Offic.*
lib. 11. de Pa-
netio.

Now by the Laws of Nature every man is bound to profit another in what he can *, nor is the same only lawful but commendable; so true was that saying, *Nothing is more serviceable to man than man* ||: But if man shall neglect this immutable Law in the aiding and assisting his fellow Citizen, and inquire and dispute why God hath laid this necessity upon him; and when Opportunity gives leave to take the benefit of Wind or Tide, (in order to his furnishing himself or Neighbour with those things that adorn humane life) to dispute the Causes of their flux and reflux, and how they vary and change; he not only offends the Laws of Nature, but assumes a power of destroying Society, and consequently becomes (at the least) a wilful Transgressor of the Laws of Nations.

And

And though the Eternal Power hath so Eſta-
 bliſhed this neceſſity in Mankind, that every man
 ſhould ſtand in need of another man, yet ſo great
 a Providence is over induſtrious men, that ſcarce
 any man not diſabled by Nature or Accident,
 Sickneſs, impotency, and the like, but by his in-
 duſtry and pains may earn more than would ſup-
 ply his neceſſities; and ſo much as any man gets by
 being truly Induſtrious above what ſupplies his
 neceſſities, is ſo much beneficial to himſelf and
 Family, as alſo an enriching to that Kingdom or
 State where he reſides: from whence it is, That
 all Mankind (preſent or to come) are either Tra-
 ders by themſelves or others; and the ends de-
 ſigned by Trade and Commerce, are Strength,
 Wealth and Employment for all ſorts of People,
 (where the ſame doth moſt flouriſh) the end
 * tending to the Advancement, Opulency, and
 Greatneſs of ſuch a Kingdom or State.

Conſtantinople (the Throne once of Chriſten-
 dom) having been ſack't by *Mahomet* the Second,
 became a place of deſolation as well as horror,
 yet he by granting a free Trade and Religion,
 ſoon after repeopled that great (but unhappy)
 Spot. Nor did *Silemus* tread amiſs in following
 the ſteps of his Victorious Predeceſſor, when ha-
 ving the like ſucceſs on *Tauris* and *Grand Cairo*,
 he tranſlated the *Persian* and *Egyptian* Artificers
 and Traders to that repeopled City, following
 the Example of the *Roman* Virtues. Nor did
 our Victorious Third *Edward* deem it an Act un-
 beſeeming his great Wiſdom, when he brought
 in the *Walloons*, whoſe Induſtry ſoon Eſta-
 bliſhed the Woollen Manufacture, he vouchſa-
 ving to give no leſs a ſecurity for the enjoying their then
 granted Immunities and Priviledges, than his

* *Coke* 2. *Inſt.*
fol. 28.

Anno 1453.
Vide *Knave*
History of
Monarchy.

Mirror, *cap.* 3.
ſect. 2.
 11 *Ed.* 3. *cap.* 3.

*Vide Cam-
p. 2. Eli-a-
508.

E. Meteran.
Hystor. Belg.
lib. 3.

own Royal Person. Nor did that politick Prince
* shut her ears from embracing the Offer of
those distressed *Burgundians* (after the Example of
her Great and Royal Predecessor) who sought re-
fuge in her Dominions from the rigid severity of
the long-bearded *Alva*, who planting themselves
by her appointment at *Norwich, Colchester, Canter-*
bury, and other Towns, have of those places (then
only habitations for Beggars) raised them now in
competition with (if not excelling) all, or most of
the Cities in *England*, for Riches, Plenty, and
Trade. Nor need we run into the History of
earlier Times to give an account of the many King-
doms and States that have risen by Industry and
Commerce; 'tis enough if we cast our Eyes on
our Neighbour the *Hollander*, a place by relation
of *Ortelius*, not much bigger than *Tork-shire*,
and such a Spot, as if God had reserved it as a place
only to dig Turf out of, for the accommodating
those Countries wherein he hoards up the miseries
of Winter, it affording naturally not any one Com-
modity of use, yet by Commerce and Trade (the
Daughters of Industry) it is now become the
Store-house of all those Merchandizes that may
be collected from the rising to the setting of the
Sun, and gives those people a name as large and
high as the greatest Monarch this day on Earth:
Nor need we pass out of Christendom to find Ex-
amples of the like, when *Venice, Genoua, Lubeck,*
Emden, and the rest of the *Hanfiatick* Towns (once
the Marts of the World, till Sloth, Luxury, and
Ambition got within their Walls, and drove it to
Ports of Industry) that have since kist and em-
brac'd it, the which this Isle, by the Influence of
his Royal Majesty hath been no small sharer in.

Hence it is, that Trade and Commerce are now
become

become the only Object and Care of all Princes and Potentates, its Dominion not being acquired by the ruful face of War, whose footsteps leave behind them the deep impreffion of misery, devaftation and poverty, they knowing the return of Commerce is Riches, and Plenty of all things conducing to the benefit of humane life, and fortifying their Countries with Reputation and Strength.

It was Trade that gave occafion to the bringing of thofe mighty Fleets to Sea, as if God had left it to them to decide by force (wherein no Age or Time can witnefs the like) the Empire of the World: Hence it was, (the advantages being found which arife by Commerce) that *Navigation* got its birth into the World, reducing the feveral Nations on the Earth by that means to be even as one Common Family; and when in this Ifle we were even in the ftate of Canibals, it brought in a People that instructed us in Arts, Policies and Manners, and taught us actions no lefs virtuous than thofe themfelves followed; And although long and difficult it was before that Mighty People could be brought over to have thoughts of the advantages arifing from *Commerce* and *Navigation* (they only propounding to themfelves Blood, Slaughter, Conqueft, the Riches and Spoils of Nations;) but when they entred into the *Carthaginian* War, a quarrel with a People not worth the oppofition of a Tribune (as they thought) but finding that neither Tribune nor *Consul*, no nor the Flower of the *Roman* Army was able to withftand them, or to prevent the Invaftion of their Country, and then in the very bowels of the fame, put it to the Queftion, *Rome* or *Carthage* Miftrefs of the World? they began to confider whence and from what caufes thofe unknown *Africans* fhould withftand the

Anno 1666,
1672, 1673.

Camæch.

Quæftus omnis indecorus patri- bus, fays Livy, lib. 1. Dec. 3.

Though they had 100 ro-
ftated Ships,
and 75 Gallies
under *Cajus*
Duillus and his
Colleague, as *Po-
lybius* obferves.

* Now the important City of Tangier.

the *Conscript Fathers* and power of *Rome*, and should dare to dispute with those that had led so many Captivated Kings in Triumph, and brought so many Haughty Nations to truckle under their Victorious Eagles, at last they found it was *Commerce* and *Navigation* that gave power and force to that mighty People; then it was that *Rome* began to know *that Rome could not be Rome without a Naval Force*; the which, and to redeem their bleeding Honour, they soon hastened and equipt, great as their Competitors; afterwards *Argentum* being won, *Carthage* became no more impregnable, after which with Peace they plowed the Neighbouring Streights to *Tinges**, *Gades*, and the *Herculean Streights*; nor could any thing be too difficult afterwards, till they arrived on the *British* shore, where beholding her ample Bays, Harbours, Rivers, Shores and Stations (the Jewels and Ornaments of that Spot, and having made a Conquest of the same) they soon cultivated into our rude Natures the spirit of *Commerce*, teaching and instructing us in those polite ways that fortifie a Kingdom by Naval force, *as the Standard and undeniable marks of Empire*; and by aiding and teaching us in the driving on a continued and peaceable Tract of *Commerce*, we have fathom'd the unknown depth of the *Indian Shores*, uniting as it were Extremes, made the Poles to kiss each other, teaching us thereby, that it was not the vast Immensities of Earth that created Empire, but Situation accompanied with *Industry, Commerce* and *Navigation* that would enable a People to give Laws to the World: In the pursuit of whose Vertues this Nation hath not been wanting, and of following their great Directions in the enlarging our Fleets; for they, when they advanced their *Eagles* on the *British* Shore, found

found us not then without Ships of Force, time
 having not been so envious to this Island, as to eat
 out those Records wherein mention is made * that * *Strabo, lib. 3.*
 the *Britains* accompanied the *Cymbrians* and *Gaules*
 in their memorable Expedition to *Greece*, long be-
 fore the Incarnation of the Worlds Saviour; and
 it was from that Center that the mighty *Cæsar* first
 drew his Line, and took thoughts of plowing the
 Ocean to find out that Warlike People to face his
 Victorious Legions, when, having landed, and
 finding a place adorned by Nature beyond any
 thing that could be called great, taught us to main-
 tain that Superiority of Dominion, that no neigh-
 bouring Nation should frequent our peaceable
 Shores, and those Merchants that came, assigned
 them places to drive their Commerce and Traffick,
 jealous that any Neighbouring Rival should kiss
 his beloved *Britannia* but a *Roman*, and for whom
 he fetcht so long and tedious a March; thus in our
 Infancy teaching us both Defence and Commerce.
 And when that mighty Empire began to decline,
 and those remaining *Romans* began to moulder and
 mix among the Natives, and to become as one
 People again, then Sloth, Luxury and Idleness (the
 fore-runners of ruine) invaded our Shores by a
 fatal stupidity, it suffered our floating Castles
 (Bulwarks of the Kingdom) to rot in their neglect-
 ed Brine, and our Ports to be surveyed by Foreign
 people; which supine negligence soon subjected us
 a prey to our ambitious Neighbors, who no sooner
 finished their Conquest, and sheath'd their devour-
 ing Swords, but each (as if inspired by the very
 Genius of the place) equipt out Fleets great as their
 Competitors, to secure what they had so dearly
 won, of whom Story makes mention of the mighty
Arthur, no less famous in his Warlike Achieve-
 ments,

Gaules Town
 near *Yarmouth*
 the Mart for
 those Neigh-
 bouring Mer-
 chants.

Abrahamus
Whelochus de
priscis Anglo-
rum legibus,
 written origi-
 nally by Mr.
Lambard.

* Inserted in
Leges Edwardi,
and afterwards
confirmed by
the *Norman*
Conqueror.

Mr. Selden's
Mare Clausum,
lib. 2. cap. the
10. to the 16.

Matth. Westm.
Anno 1035.
fol. 409.
Selden's Mare
Clausum, lib. 2.
cap. 11.

ments, than in leading his Squadrons as far as *Iceland*, bringing those *Northern* People to pay obedience to his Victorious Standard, and acknowledge him as their Supreme Lord even from the *British* to the *Russian* Tracts, and by him left to the famous *Edgar**, who no sooner found his undoubted Right, but resolved to vindicate that Dominion which his Royal Predecessor had with so much glory acquired, and with so great care communicated and remitted down to his Successor: With no less a number than four hundred Sail of Ships did that mighty Prince at once cover the Neighbouring Ocean, making them the *Portcullis* of this Isle and the adjacent Seas, by which he vindicated his Dominions on the Waters, and gave Laws in the Chambers of his Empire: Nor did his Successors *Canutus*, (whom Record makes mention that having laid that ancient Tribute called *Danegeld*, for the guarding of the Seas and Sovereignty of them, was emblematically exprest sitting on the shore in his Royal Chair while the Sea was flowing, speaking, *Tu mea ditionis es, & terra in qua sedeo est*, &c.) *Egbert*, *Althred*, *Ethelfred*, forget the assertion of their great Predecessors Dominion and Sovereignty of the same under no lower a stile than **Supreme Lords and Governours of the Ocean, surrounding the British Shore**, never so much as contested by any Nation whatsoever, unless by those that attempted the Conquest of the entire Empire, in which that became subject to Fate as well as the other of the Land: Nor did the succeeding Princes also of the *Norman* Race start or wave that mighty advantage in their successive Claims, and maintaining their Right to the adjacent Sea; as appeared not long after by that famous Accord made between *Edward* the First, and

and the *French King Philip the Fair*, calling * him * Coke 4. Inst. fol. 142 to an account for Piracies committed within the *British Seas*; the Submission of the *Flemmings* in open Parliament in the Second *Edward's* Reign; and the Honour or *Duty of the Flag*, which the politick King *John* had above Four hundred years since challenged by that memorable Ordinance at *Hasting* || there decreed to take place univerfally, || Inter Leges Marinas sub fine anni Regni Regis Johan. 2. not barely as a *Civility*, but as a *Right*, to be paid *cum debita reverentia*, and persons refusing, to be assaulted and taken as Enemies; the same not only to be paid to whole Fleets bearing the Royal Standard, but to those Ships of Priviledge that wear the Princes Ensigns or Colours of Service: Nor was this barely a Decree written, but nobly asserted by a *Fleet* of no less than 500 Sail in a Voyage Royal of his, wherein he sailed for *Ireland*, in his way commanding all Vessels which he met in the Eight circumfluent Seas to pay that Duty and Acknowledgment. Nor was the Third *Edward* slow in following the steps of his wise Predecessors, when he equipt out a *Fleet* of no less than 700, (though on another occasion) with 200 of which he vanquished a *Fleet* of twice the number before *Calice*, to the loss of 30000 *French*. Nor did our Victorious Conquerour of the sepulchre the Great *Richard*, in his return from the *Holy Land* want a Navy Royal to attend him home, by the force of which he took and destroyed near 100 more Ships of the *French*. And look we but into the mighty Actions of the succeeding Princes, we shall find that all that ever designed Empire were zealous in the encouragement of Navigation, looking on that Axiom as undeniable, * *Qui Mare tenet, eum* * Cic. ad Attic. l. 10. Ep. 7. *necesse esse rerum potiri*, and that without which the *British* Sovereignty is but an empty Title.

Nor

Nor ought alone the Praises of those great Monarchs, whose mighty care had always been to preserve the Reputation of their Empire in their Maritime preparations, to be remembred; but also those of our Inhabitants, who always have been as industrious to follow the encouragement of those Princes under whom they flourish'd, and who with no less Glory and timely application in Traffick, did constantly follow the examples of those of *Genoa, Portugal, Spaniards, Castilians and Venetians*, whose Fame in matters of Commerce ought to be inrolled in Letters of Gold, since the Ages to come, as well as present, having been doubly obliged to their memory, the third of which making use of a discontented Native of this Isle, the Famous *Columbus* who, prompted by that Genius that naturally follows a Native wise man, discovered a new World, in whose Expedition he fathomed unknown Paths, and detected the *Antillas, Cuba* and *Jumaca*, &c. and the *Terra Firma* of the *American Shore*, who taking his Conjectures from the spiring of certain Winds from the *Western* Points by strong impulse, accompanied with that Philosophy he attained to, concluded some Continent must needs be hid in those unknown Parts; his Service being first offered to his Prince || and refused, he was soon after entertained, purely on the Faith of that Noble Princess *Isabella of Spain*, who for 17000 Crowns (for which she engaged her *Jewels*) received not long after as many Tuns of Treasure, and to her husband's own use in eight or nine years time came above Fifteen hundred Thousand of Silver, and Three hundred and sixty Tuns of Gold. Thus Ingenuity encouraged, though in one single person, hath occasioned Wonders, and from a small Kingdom (as *Spain*)

it

Born in *England*, but resident at *Genoa*.

|| *Hen. 7.*

Campanel. Hist. Hispan.

it hath since raised its head in a condition of bringing all those many Kingdoms and vast Immenſities of earth which they poſſeſs under their Protection, putting them once on thoughts of no leſs than an **Univerſal Monarchy**: We need only mention *Sebastian Chabot* a Native of *Briſtol*, who diſcovered *Florida* and the Shores of *Virginia* dedicated to that Virgin Princeſs *Elizabeth*; *Thorn*, *Elliot*, *Owen*, *Gwyned*, *Hawkins*, *Cavendiſh*, *Furbiſher*, *Davis*, *Stadſon*, *Raleigh*, and the incomparable *Drake*, who was the firſt (agreed univerſally) of any Mortal to whom God vouchſafed the ſtupendious Atchievement of incompaſſing not this New World alone, but New and Old together, twice embraced by that mighty Man, who firſt making up to *Nombre de Dios*, got ſight (with tears of joy) of the *Southern Seas*, the which in five years after he accompliſhed, paſſing through the *Magellan Streights* towards the other *Indies*, and doubling the famous Promontory, he circumnavigated the whole Earth.

Nor ought that truly worthy Captain Sir *John Norborough* be precluded from having place after the mighty *Drake*, he having not long ſince paſſed and repaſſed the *Magellan Streights*, by which that worthy perſon hath performed that Atchievement which was never yet done by any Mortal before. To reckon up the particular Actions of *John Oxenham* (a ſharer in that mighty performance of *Drake*) of his drawing his Veſſel up to Land, and covering the ſame with boughs, paſſed the unknown paths of Land from *Nombre de Dios* to the *South Sea*, and there building a Pinnace, enters the *Iſle of Pearls*, and from the *Spaniards* takes a Treafure almoſt beyond credit; of the indefatigable diligence of *Willoughby*, *Burroughs*, *Chancellor*, *Button*, *Buffin*, *Furbiſher*, *James Middleton*, *Gilbert Cumberland*,

berland, who plowed up the *North-East* and *North-West Cathaian* and *China* passage; of *Jones* and *Smith*, whose Fortune and Courage was great in those Parts; of *Poole*, who found out the Whale Fishing; of Captain *Bennet* the first Discoverer of *Cherry-land*; *Gillian* and of *Pett*, and *Jackman* that passed the *Vaigates*, *Scythian* Ices, and the River of *Ob*, as far as *Nova Zembla*; nor of the Famous *Davies* and *Wood*, who had penetrated to 86 degrees of Latitude, and almost set their feet on the *Northern Pole*, and for truly valiant the famous *Monk*, *Blake*, *Lawson*, *Mimes*, *Sandwich*, *Offery*, and the never to be forgotten *Spragg*, and living his Royal Highness *York's* Victorious Duke, and the brave *Rupert*, Men whose Courage and glorious Actions as well in Battles as in the achieving of Discoveries, and pointing out to places for an immense Improvement in Navigation & Commerce, ought to be inrolled in the Temple of Fame as Monuments to succeeding Ages, of their mighty and laborious Travails and Industry. The consideration of all which gave some sparks of encouragement to the writing the ensuing Tract, especially when reflecting that among all Nations there is a Common Law which governs the mighty thing of Navigation and Commerce, I had some impulses more than ordinary to induce me to the same, especially at a time when Navigation and Commerce were never (from the erection by Divine instinct that mighty Prototype the Ark to this present Age) in greater esteem than now, and by which we have found vast and great easements and discharges from those Royal and just Rights and Dues which now and of Old were justly due to those that Govern'd this Empire; therefore ought by a'l ways and means to be fortified and encouraged,

The Articles of Enquiry annexed to them in 12 Ed. 3. The Inquisition at *Quinborough*, 49 E.3. Anno 1375. Statutes of Enquiry translated by *Roughron*.

conveniences or inconveniences meets with it ; nor have those Laws, instituted at *Oleron*, obtained any other or greater force than those of *Rhodes* or Imperial, considered only from the reason the which are not become Laws by any particular Custom or Constitution, but only esteemed and valued by the reasons found in them, and applied to the case emergent.

'Tis true, that in *Rome* and some other parts of *Italy* and *Germany*, and the Kingdom of *Portugal*, in all those cases wherein the municipal Ordinances of those Countries have failed in providing, the Imperial Laws (if the case be such as that it *non Tragua peccado*, or be not spiritual) is there made of force ; but there is no other Nation, State or Republick can be named where any part of the body of those Imperial Laws hath obtained the just force of a Law, otherwise than as Custom hath particularly induced it ; and where no such settled Custom hath made it a Law, there it hath force only according to the strength of reason and circumstance joyned with it, or as it shews the Opinion and Judgment of those that made it, but not at all as if it had any commanding power of obedience, that is, *valet pro ratione, non pro inducto jure pro ratione quantum Reges Dynasta & Republica intra potestatis sua fines valere patiuntur* : And for *Spain* it is observed, *Hispani duplex habent Jus solum Canonicum scilicet & Regium ; Civile enim* (meaning the Imperial Laws) *non habet vim Legis, sed rationis*. And since this Kingdom, as well as most others, being free from all subjection to the Empire, having constituted or known Laws of its own, excludes all Imperial power and Law, otherwise than as Custom hath variously made some admission,

Selden's Titles of Honour, lib. ult. cap. ult.

sion, I applied my self to the Collection of such matters, according to my inconsiderable Judgment, as are either constituted by the Supreme Authority of the Three Estates, or that which hath in some measure obtained by continued Custom the force of Law in reference to matters Maritime and of Commerce as well in cases publick as private.

By the first part of which I thought it necessary, since Nature by Traffick hath made us all Kinsmen, to consider and examine upon what Grounds, and in what manner *Commerce* was first procured and established, which is by the Laws of Leagues, Embassies, and the like, which is a thing fit to be known; so likewise of what may interrupt the same, and likewise of those perpetual Rights that are between those that have any reference to Seafaring causes in matters Civil.

In the prosecution of this Work, I have taken care to refer those things which pertain to the *Laws of Nature* unto Notions so certain, that no man, without offering of violence to himself, may deny them; and to ascertain the truth of such, I have used the Testimonies of such Authority (as in my weak Judgment are of Credit to evince the same) and as to that Law which we call the Law of Will or common consent or the Law of Nations, for that which cannot by sure consequence be deduced out of sure Principles, and yet appears every where observed, must needs have its rise from free will and consent, which is that which is called the *Law of Nations*; both which (as much as possible) hath been endeavoured to be kept asunder where the matter hath required it. And for the Civil Law, I have ascertained the several Authorities which I have made use of, that is, of the *Romans*, into

three sorts, the *Pandects*, the *Code* of *Theodosius* and *Justinian*, the *Novel Constitutions*, and these most excellent *Jurisconsults* that have by their profoundness of Judgment illustrated the obscure paths of the same Law; the third those most excellent persons who joyned Policy to Law, as *Grotius*, *Raleigh*, *Bacon*, *Selden*, and the like. Of other Pieces, that of *Shardius*, entituled *Leges Navales Rhodiorum & selectæ Rhodiorum*, *Petrus Pekius* the *Zealand*er, *Locinius*, *Vinius*, that of *Oleron* collected by *Garasias* alias *Ferrand*, and *Cleriack*.

As to those matters that have passed the Pikes at the *Common Law*, I have as carefully as possible referred to their several Authorities. In the whole Work I have no where meddled with the *Admiralty* or its Jurisdiction, knowing well that it would

It is called *Imperium*, because it proceeds from the Authority of the Judge, and not from any right inherent in the party.

Leg. 1. §. de Const. Princip.
Coke lib. 10. fol. 73. in le Case
del Marshallsea.

have been impertinent and sawcy in me to enter into the debate of *Imperium merum*, *Imperium mixtum*, *Jurisdiction simplex*, and the like, and of the bounding out of Jurisdictions, which in effect tends to question the Government, and trip up the Power that gives Laws and Protection to us, since all that can be said, as well on the one side as the other, hath been so fully and Learnedly handled and treated of by several Worthy Persons, (that have indeed said all that can be said) but more especially in that Famous Dispute not long since before His Sacred Majesty in Council, where all the most Elaborate and Ingenious Reasons that could be drawn by the Skill of a Learned Civilian, were there asserted in vindicating the Admiralties Jurisdiction, by the Judge of the same, Sir *Leoline Jenkins*, in answer of whom was produced that Great Good Man the Lord Chief Justice

Justice *Hales*, who as well by Law positive as other his great Reafons, soon put a period to that Question, which during his days slept, and it may modestly be presumed will hardly (if ever) be awaked.

He that hath never so little to do with the Compass, though he sits still in his place, does as much or more than all the other necessary noise in the Ship; the comparison is quit of Arrogance, for it holdeth in the design, it is not meant of the performance.

And though I well know, That those that spend their time in brewing of Books, are by *Seneca* compared to petty Painters, that busie themselves in copying out Originals, having this half Verse of *Horace* often thrown in their Teeth,

-----*O imitatores, Servum pecus!*

Yet I have this hope left, That my faults and flaws, like those found in the Cuts of Diamonds, may at this time the easier escape under the excellency of their Subject, or at least under that of your Charity.

Charles Molloy.

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CHAP.

CHAP. I.

Of Dominion or Property in general, and of
the Causes changing the same by War.

- I. Of Dominion in the primitive state of Man.
- II. That such a Dominion universal might have continued.
- III. Of the causes changing the same.
- IV. Of things excepted tacitely by the Law of Dominion.
- V. Of Property where the same may be changed against the owner by War.
- VI. Of Publick War solemn or less solemn.
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- IX. Of War by the Laws of England.
- X. That Justice is the very Basis that must support a War.
- XI. Justice what, and whether War is justifiable by the Laws of Nature to preserve the same.
- XII. Of War, and of the Ships and Goods of an Enemy, where the Property is changed by the Laws of Nature and of Nations.
- XIII. Where the Property of Goods taken from an Enemy is qualified by the Law Civil.
- XIV. Of Restitution where the same by Law may be of Goods or Merchandise acquired in War.
- XV. Of Restitution ex gratia made by the Sovereign of him whose Ships are lost, and regained afterwards in Battel by Ships of War, and of the like by Princes or Republicks in amity.
- XVI. Of the assaulting an Enemy in the Ports or Havens of Nation Neuter, whether lawful by the Laws of Nations.
- XVII. Of Protection given to Ships of Enemies being in Port before, and found there after War denounced.
- XVIII. Of the goods of friends found in the Ships of Enemies, and of those of Enemies found in the Ships of Friends, and where Property of the same is altered.
- XIX. Whether against Nature to destroy the Goods and Ships of our Enemies.
- XX. Of Interpellation and Denunciation, whether necessary by the Laws of Nature and of Nations.
- XXI. Of Denunciation by the Custom of the Romans and other Nations, and whether requisite at this day.
- XXII. War where proclaimed against any one, includes his Subjects and Adherents, but not as considered by themselves.
- XXIII. The true reason wherefore Indiction was introduced.
- XXIV. Of the Goods of Friends that supply an Enemy, whether subject to be made Prize by the Laws of Nations.
- XXV. How dealt withal after seizure, by the practice of ancient and modern Ages.
- XXVI. Whether lawful for a Christian to assist an Infidel against a Christian by the Laws of Nations, and by our Religion.

I. **N**O sooner had the Eternal Power created Man, but he bestowed on him a Right over the things of this inferiour Nature; nor was his goodness lessened upon the

Justin. lib. 43. reparation of the World, after the Flood, (*all things being then undivided and common to all, as if all had one Patrimony*) since every man might then take to his use what he pleased, and make consumption of what he thought good in his own eyes; which use of the universal right was then instead of Property: for what any one had so taken, another could not without injury take away from him.

A Theatre is common, yet the place possessed by any one, may be rightly called his own.

Justin. lib. 2. ut de Scythis loquitur Trojus.

Primum inter Homines mali nescia, & adhuc astutiae inexperat simplicitas.

II. Nor was it impossible for that state to have continued, if men through *great simplicity*, or *mutual charity* had lived together, and this is instanced in those *Americans*, who through many Ages have lived in that community and custom, and the other of *Charity*, which the *Essens* of old practised, and then the *Christians* who were first at *Hiernsalem*, and at this day not a few that lead an ascetic life; the simplicity of our first Parents was demonstrated by their nakedness, there being in them rather an *ignorance of vice, than a knowledge of Virtue*, their only business being the Worship of God, living easily on those things, which the Earth of her own accord brought forth without labour.

Seneca Naturalium 3. in fine.

Ne insigne quidem aut patire limite campos Fœs erat.

III. Yet in this simple and innocent way of life, all men persisted not, but some apply'd their minds to various *Arts*; the most ancient of which was *Agriculture and Pasture*, appearing in the first *Brothers*, not without some distribution of *Estates*, and then from the diversity of each man's actions arose *Emulation*, and then *slaughter*; and at length, when the good were infected with the bad, a *Gigantick kind of life*, that is, *violent*; but the World being washed by the *Flood*, instead of that fierce life, succeeded the desire of *Pleasure*, whereunto *Wine* was subservient; and thence arose *unlawful Loves*, but by that more *generous vice Ambition*, Concord was chiefly broken, after which men parted asunder, and severally possess'd several parts of the Earth; yet afterwards, there remain'd amongst Neighbours a communion not of Cattle, but of Pastures, because in the small number of men, so great was the latitude of Land, that without any incommodity it might suffice to the uses of many, until the number of men, so of Cattle increased, Lands every where began to be divided, not among Nations as before, but among Families; an instance of which we have hourly before our eyes in those vast immensities that are daily appropriating

priating and a planting in *America*, from hence we learn what was the cause for which men departed from the primitive communion of things, first of *moveables*, and then of *immoveables* also; to wit, because when not content to feed upon that which grew of it self, and the Earth singly brought forth, to dwell in *Caves*, to go *naked*, or clad with *rinds of trees*, or *skins of Beasts*; they had chosen a more exquisite kind of life, there was need of *Industry*, and using of *Art* in those matters, which they should give themselves up to; so likewise from hence we learn, that men not content to live in that innocent state of community, how things went into *Property*, not only by the act of the mind (for they could not know the thoughts of one another, what every one would have to be his own, that they might abstain from it, and many might desire the same thing) but by a certain *Covenant*; either *express* as by division, or *tacit* as by *occupation*: for so soon as *Communion* did not please them, and division was not made, it ought to be supposed an agreement amongst all, that every one should have proper to himself what he seized on, * *for every one might prefer himself before another, in getting those things useful for the accommodating of Humane life, Nature not being repugnant to the same.*

Bodin. lib. 3.
cap. 7.

Grotius de Matr.
libero cap. 15.

* Cic. offic. 1.
Addendum il-
lud Quintilia-
ni; Si hæc con-

ditio est, ut quicquid in usum homini cessit, proprium sit habentis, profecto quicquid jure possidetur, injuriâ auferatur. Macrobius Saturn. l. 3. c. 12.

IV. And though *Property* may seem to have swallow'd up all that right which arose from the common state of things, yet that is not so; for in the *Law of Dominion*, *extreme necessity* seems excepted. Hence it is that in *Navigation*, if at any time *Victuals* fail, what every one hath, ought to be brought forth for the common use: and so in a *Fire*, I may pull down or blow up my *Neighbours House* to save mine; destroy the *Suburbs*, to raise *Lines* or *Forts* to preserve the *City* thereby; dig in any mans *Grounds* for *Salt-peter*, cut in pieces the *Tackling* or *Nets* upon which my *Ship* is driven, if it cannot be disentangled by other means: all which are not introduced neither by the *Civil Law*, nor the *Municipal Laws* of Countries, but are expounded by them, with their proper diversities.

Leg. 2. §. cum
in eadem D.
Leg. Rhodani.
Quæ non fragm.
§. Quod ait.
D. incend. Leg.
Quemadmodum
§. item D. ad
l. Aquilam.

12 Ed. 3. tit. distress. 170. 11 H. 7. 5. Reniger & Fogassas, Plowden fol. 1. to the 10.
Coke 3. Instit. fol. 83. V. Nor

*Bald. li. 3. de
rerum diverso-
rum, seems to
have been of
opinion, that
by the Laws of
Nations one*

may take Arms to abate the growing power of his Neighbours. *Sed ut vim pati posse ad vim inferendam jus tribuat, ab omni equitatis ratione abhorret*: But that a possibility of suffering force, should give a right of offering of force, this is far from all equity, says the excellent *Grotius lib. 2. cap. 1. sect. 27.* Sir *Walter Raleigh* in *Hist. of the World*, cap. of Duels, fol. 550.

But then such War must be just, and he that undertakes it must be a *Sovereign*; the just causes to make a War are our *Princes*, or *Countries* defence, and that of our *Allies*, the satisfaction of our injuries, or theirs; our just pretensions to an Estate or Right; *Divines* have added another, not only the defence of Religion, but its advancement and propagation, by the way of Arms, and some the extirpation and rooting up a contrary. Certainly War is too rough a hand, too bad a means, to plant Piety; *Sicut non Martyrem pœna, sic nec fortem pugna, sed causa*; As it is not the punishment that makes the Martyr, so it is not fighting that declares a valiant man, but fighting in a just cause; in which whoso shall resolvedly end his life valiantly, in respect of the cause, that is, in the defence of his Prince, Religion or Country, ought to be numbered amongst the Martyrs of God.

*Ita inter cives
erant quidam
matrimonium
iusta, non iusti
liberi. Paul.*

*Sent. lib. 2.
tit. 19.*

VI Publick War is either *Solemn* by the Laws of Nations, or else less *Solemn*. What we here call *Solemn* is commonly called *Just*, in the same sense as a just Testament is opposed to *Codicils*, not that it is not lawful for him that pleaseth to make *Codicils*, but because a *Solemn* Testament hath by the Civil Law some peculiar effects; and this difference is worth observation, seeing many misunderstanding the word *Just* conceive all Wars to be condemned as unjust and unlawful, whereunto this appellation of just is not agreeable.

VII. That War, according to the Law of Nations, may be *Solemn*, two things are requisite: First, That it be waged on both sides by his Authority who hath the highest Power in the Commonwealth. Secondly, That certain Rites be used (of which we shall speak in due place) one of

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of these without the other (because they are both required) doth not suffice. Publick War less Solemn may want those Rites, and be waged against private persons, and have for the Author any Magistrate. And according to the opinion of most Civilians, if the matter be considered without Civil Laws, it seemeth that every Magistrate hath right to wage War, as for the defence of the people committed to his charge, so for the exercise of Jurisdiction, if he be opposed by Force: but because by War the whole Commonwealth is endangered; therefore by the Laws of all Nations that War be not undertaken without the Authority of him whose Power in the Commonwealth is the highest, there is extant such a Law of *Plato's*, and in the Roman Law it is called Treason in him who, without the command of the Prince, hath waged War, or listd Souldiers, or raised an Army; in the *Cornelian Law* brought in by *L. Cornelius Sylla* it was, *without the command of the people*; in *Justinian's Code* is extant a Constitution of *Valentinian* and *Valens*, *None have leave to take any Arms without our knowledge and direction*. And my Lord *Coke* in his third Institutes observes, That by the Common Law of this Realm it was High Treason to levy a War without Authority from the King, for to him it belongeth only. And the reason why it should be so subjected is, because that natural Order for preserving of peace among men requires that an Authority and Council in undertaking of War should remain in Princes.

*Ult. de reg. l. 3.
D. ad Leg. Jul.
maj.*

*Fol. 9. Le Roy de
droit doit s'aver
et defendre son
Realm vers E-
nemis, &c.
Fitz-h. rb. Nat.
Bre. fol. 113. 4.*

VIII. But as all Laws must be interpreted by Equity, so must this Law; and therefore there is no question but that 'tis lawful for one having Jurisdiction by force of those which we call a peaceable Guard or Power, viz. Constable, Serjeants, Watch-men, &c. to constain a few disobedient persons as oft as there is no need of greater Power to that purpose, and no eminent danger to the Commonwealth. Again, if it be so present a danger, that time will not admit of Consultation with him who hath Supreme Power, here also necessity affordeth another exception; and therefore in Garrisons, if the Townsmen should endeavour to fall over to an Enemy, they may be dealt withal as Enemies by the Governour of the Garrison, and by that right *L. Pinarium* Governour of *Enna*, a Garrison in *Sicily*, having information that the Townsmen were falling

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off to the *Carthaginians*, making slaughter of them kept the Town: and the reason why such extraordinary Force is called War, is, for that the same is commenced by the right of the Magistrate, in which case the War is supposed to be made by the highest Power, because every one is judged Author of that which he giveth another Commission to do; besides the universal reason which warrants the act, which requires that all dangers, Rebellions and Insurrections be withstood and checkt in the very bud, and though this is called War, yet this strictly is not properly War, though the parties who suppress or punish are impune.

IX. But War properly by the Laws of this Realm or *Solemn*, is, when the Courts of Justice are shut up, and the Judges and Ministers of the same cannot protect men from violence, nor distribute Justice: so when by *Invasion*, *Insurrection*, *Rebellion*, or the like, the current of Justice is stopt and shut up, *Et silent leges inter arma*, then it is said to be time of War, and the tryal of this is by Records and Judges of the Court of Justice, and not by a Jury. So likewise War by the Laws of *England* is when the Kings Standard and Host enter the Realm of another Prince or State, and hath been there by the space of forty days, for till then the War is not properly said begun.

X. Wars, though undertaken by publick Authority, must have the effects of Law, that is, there must be a just cause for the undertaking the same; so that *Alexander*, if that without cause he warred upon the *Persians* and other Nations, is by the *Scythians* in *Curtius* and by *Seneca* too deservedly called a Robber. For take away Justice, and what are Kingdoms but great Robberies? Therefore the just cause of taking Arms must be the iniquity, or as we understand it, the injury of the adverse party, according to the words used in the ancient denunciation of the Roman Heralds, * *I call you to witness, that people is unjust, and doth not perform what is right*. Now that is unjust which hath a necessary repugnance to the rational and social nature. Now amongst the first principles of Nature there is nothing to war, there is much in favour of it; for both the end of War, the conservation of life and members, and the keeping or acquiring of things useful unto life is most agreeable unto those principles: and it need be, to use Force to that purpose is not disagreeable,

14. Ed. 3. tit.
Scire facias
122. inter Mor-
timer and the
Earl of Lanca-
ster.

Trin. 7 Ed. 3.
fol. 29.

*Seneca de bene-
fic. l. c. 13.*

* *Ego vos testor,
Populum illum
injustum esse, ne-
que jus persol-
vere.*

since

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since every thing hath by the gift of Nature strength, to the end it may be able to defend and help it self, and therefore he is by Nature fitted for Peace and War; though coming into the World unarmed, yet he hath a hand fit to provide and handle Arms, the which we daily see children of their own accord, without a Teacher, make use of for a Weapon. Moreover right reason and the nature of society inhibits not all Force, but what is repugnant to society, that is, which depriveth another of his right; for the end of society is, that by mutual aid every one may enjoy his own. And this were so, although the Dominion and Propriety of Possessions had not been introduced; for life, members, liberty would yet be proper to every one, and therefore could not without injury be invaded by another, and to make use of what is common, and to spend as much as may suffice Nature, would be the right of the occupant, which right none without injury, could take away: and that is made evident, since by Law and use Dominion is established, and that appears by the Orator, *Ut si unumquodque membrum sensum suum haberet, ut posse putaret se valere si proximi membri valetudinem ad se traduxisset, debilitari & interire totum corpus necesse est*: and applying that, says, So if every one of us snatch unto himself the commodities of other men, and draw away from every one what he can to advantage himself, humane Society cannot stand, Nature gives leave to every man, in the acquisition of things useful, to supply himself before another: but by the spoils of another to increase his own store, that Nature doth not permit. It is not then against Society to provide for ones self, so that anothers right be not diminished; nor is that violence unjust which doth not violate the right of another. Of the two kinds, contention by debate and by force, the one agreeing to men, the other more becoming beasts, we must flie unto the latter when the former will not serve. The incomparable Ulpian says, Cassus writes that it is by Nature lawful to repel force by force, and arms by arms. And this is further proved out of Sacred History; for when Abraham having armed his Servants and Friends, pursued the four Kings that Spoiled Sodom, and returned with Victory and Spoil of the Enemy, God by his Priest Melchisedeck approved his action, Blessed be the most High God, said Melchisedeck, who hath delivered thine enemies into thine hand. Abraham,

Tully's C. ffic. 3.

Leg. 1. sect. viii
vi. D. de vi, &
vi. arm. a. a.

Gen. 14. 18.

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as appears by the story, had taken Arms without any special Commission from God; therefore the Law of Nature was his Warrant, whose wisdom was no less eminent than his Sanctity, nay God himself hath prescribed to his people general and perpetual Laws of waging War, thereby shewing that Wars may be just, even without his special Mandate; for he doth plainly distinguish the cause of the seven Nations (in which God gave a special Mandate for the destroying of them, which is properly called the Wars of God, and not of humane Council) from the cause of other people, and prescribing nothing about the just causes of entering into War, thereby shews them to be manifest enough by the light of Nature, as the cause of the defending of the Frontiers in the Wars of *Jephtha* against the *Ammonites*, and the cause of Ambassadors violated in the Wars of *David* against the same.

XII. By the Law of Nature in War those things are acquired to us, which are either equal to that, which being due unto us, we cannot otherwise obtain, or else is such a mark as does infer damage to the guilty party by a fit measure of punishment and by the Laws of Nations, not only he that wagem War on a just cause, but every one in solemn War, and without end and measure, is master of all he taketh from the Enemy in that sense that by all Nations, both himself and they that have Title from him, are to be maintained in the possession of them; which as to external effect we may call Dominion; *Cyrus in Xenophon, It is an everlasting Law among men, that the Enemies City being taken, their Goods and Money should be the Conquerours*; for the Law in that matter is as a common agreement, whereby the things taken in War become the Takers. From the Enemy are judged to be taken away those things also which are taken away from the Subjects of the Enemy, and Goods so taken cannot by the Law of Nations be properly said taken; but when the same are out of all probable hopes of recovery, that is, as *Pomponius* observes, brought within the bounds or guards of the Enemy; For, says he, such is a person taken in War, whom the Enemies have taken out of our, and brought within their guards, for till then he remains a Citizen. And as the Law of Nations is the same reason of a man, so likewise of a thing; and therefore Goods and Merchandize are properly

*Xenoph. 3. de
Instit. Cyri.*

Arist. 1. Polit.

*Hujusmodi res
non tam capta
quam recepta
intelligitur, per
D. per Pomponi-
um & Leg. in
Bello Parag. Si
quis servum in
pr. de capt. &
post.*

perly said to be the Captors, when they are carried *infra* *Prasidia* of that Prince or State, by whose Subjects the same were taken, or into the Fleet, or into a Haven, or some other place where the Navy of the Enemy rides: for then it is that the recovery seems to be past all hope. And therefore the Common Law of this Realm calls such a taking a *Legalis Captio in Jure Belli*, and in 7 R. 2. an action of Trespass was brought for a Ship, and certain Merchandize taken away, the Defendant pleaded that he did take them in le haut Mer ou les Normans queur sont Enemys le Roy: and it was adjudged, that the same Plea was good. And in the year 1610. a Merchant had a Ship and Merchandize taken by a Spaniard, being an Enemy; a month after a Merchant Man, with a Ship called *The little Richard*, retakes her from the Spaniard: it was adjudged, that such a possession of the Enemy, divested the Owner of his interest, and the retaking afterwards in Battel, gained the Captors a property.

XIII. 'Tis true, the Civilians do hold, That it is not every possession that qualifies such a Caption, and makes it become the Captors; but a firm possession (that is) when the prize doth *pernoctare* with the Enemy, or remain in his possession by the space of 24 hours; but as this is a new * Law, so it is conceived to be against the ancient Judgments of the Civil Law as well as the modern practice of the Common Law: for the party in the ancient Precedents doth not mention by their Plea, that the prize did *pernoctare* with the Enemy, but general, that the same was gained by Battel of the Enemy.

XIV. This right of changing of Dominion or Property by force of Arms, is so odious, that in the taking of Goods, if by any possibility the right Owners may have restitution, the same hath been done. And although a larger time than 24 hours happens between the capture and recapture, and so may *pernoctare* with the Captor, yet restitution may be made; and therefore if one Enemy takes the Ship and Merchandize of another Enemy, and brings her into the Ports or Havens of a Neuter Nation, the Owners may seize her, and the Admiral of that Neuter Nation may in some cases restore the Ship and Goods to their Owners, and the persons captive to their former liberty; the reason is, for that the same ought to have been brought

2 R. 3. fol. 3.
7 R. 2. Trespass
Stattham Pl. 54.

M. 8 Jac. in
B.R. Brownlow
2. part in We-
stens C.

* Consulat. Ma-
ris c. 283, 287.
Constitutio Gallicae
lib. 20. tit. 13.
art. 24.
7 R. 2. Trespass
Stattham Pl. 54.

infra

^a *Res quæ intra præsidia perdu-
ænondu sunt,* *infra Præsidia* ^a of that Prince or State, by whose Subject
she was taken.

Et nondu sunt, *quantum ab* A *Dunkirk* having seized a *Frenchman's* Vessel, *super*
hostibus occupa- *altum Mare*, sold the same with her lading at *Weymouth*;
ta, Dominum whither it had been driven before she was brought *infra*
non mutarunt *Præsid. Dom. Reg. Hispania*: The *Frenchman* coming into
ex Gentium jure. Port, there claims the benefit of the Laws of Nations, the
Grotius de jure King of *England* being then in amity with both their Prin-
Belli ac Pacis, ces, and that restitution be made; in which case it was
l. 3. c. 9. §. 16. resolved by all the Judges, ^b That if there be a Caption
^b *Trin. 17. Car. 1.* by Letters of *Marque*, or by *Piracy*, and the Vessel and
in B. R. Mar- Goods are not brought *infra Præsidia* of that Prince or
she's Reports. State, by whose Subject the same was taken, the same
will not divest the property out of the Owner; with this
agrees the Law Civil, and restitution may be made. For
this is not an absolute property immediately vested in the
Captor upon the taking; but a conditional property to
answer the original debt or damage, which cannot be
done without a Judicial adjudication, the opportunity of
which he hath lost by bringing the prize into the Country
of another Prince: for as to private War, their Countries
are as an Asylum.

Per leg. libertas,
Et de leg. Jur.

XV. But if the Ships of War of Nations in enmity meet

at Sea, and there be a caption, if there be that which is
called a *firm possession*, the *Newer Nation* cannot re-deliver
or make restitution of the thing so acquired: and so it was
adjudged, where *Samuel Pellagy* with a Ship of War of the
Emperour of Morocco, took a *Spanish Ship*, and brought
the same into *England*, that he could no ways be question-
ed for the same *criminaliter*, or restitution to be made
civiliter; for that the King of *Spain* and the *Morocco Em-*
perour were enemies, and the King of *England* in amity
with both, and that such a caption is not called *Spoliatio*,
sed legalis captio, in which there can be no restitution made,
upon neither of the Statutes of 31 H. 6. cap. 4. or 27
Ed. 3. cap. 13. for he that will sue to have restitution in
England for Goods taken at Sea, must prove, *That the So-*
veraign of the party was in amity with the King of England.
Secondly, *That he that took the Goods, his Prince was at the*
time of the taking in amity with the Sovereign of him whose
Goods were taken; for if he, which took them, was in
enmity with the Sovereign of him whose Goods were ta-
ken,

Bulstrode, 3. part.
fol. 28. cited in
Marjhe's Case.

The getting of
Letters of Re-
prizal against a
Nation, does
not make a
War between
both States;
nor can they
be said to be at
enmity.

22 E. 3. fol. 13.
Coram Rege &
Concilio suo in
Camera Stella-
rum. Michaelm.

ken, then the same will not amount unto a depredation or robbery, but a lawful taking, as every enemy might take of another. 2 R. 3. fol. 2. A.

A Spanish Merchant, before the King and his Council, in Camera Scaccarii, brought a Bill against divers English-Men, wherein setting forth *quod depredatus & spoliatus fuit*, upon the Sea, *juxta partes Britannia per quendam Virum Bellicosum de Britannia, de quadam Navi*, and of divers Merchandises therein, which were brought into England, and came into the hands of divers English-Men, naming them, and so prayed process against them, who came in, and pleaded, that in regard this depredation was done by a Stranger, and not by the Subjects of the King of England, they ought not to answer. It was there resolved, *Quod quisquis extraneus*, who brings his Bill upon this Statute to have restitution, *debet probare quod tempore captionis fuit de amicitia Domini Regis*; and also, *quod ipse qui eum receperit, & spoliavit, fuit etiam sub obedientia Regis, vel de amicitia Domini Regis, sive Principis querentis, quia si fuerit inimicus, & sic ceperit bona, tunc non fuit spoliatio, nec depredatio, sed legalis captio, prout quilibet inimicus capit super unum & alterum*. 7 E. 4. 14.
13 E. 4. 9.
22 E. 3. fol. 23.
2 R. 3. fol. 2.

But if the King of England is in enmity with the States of Holland, and one of their Ships of War takes a Merchant-Man of the King of England's, and afterwards another Ship of War of England meets the Dutch-Man and his prize, and in *aperto prelio*, regains the prize, there restitution is commonly made, the Owners paying the *Salvage*: so where the prize is recovered by a Friend in amity, or comes into his Ports, restitution is likewise made; but when such Goods become a lawful and just prize to the Captor, then should the Admiral have a tenth part, following the religious example of Abraham, after his Victory over the five Kings.

Boyce & Cole, vers. Claxton, Hill, 26, & 27 Car. 2. in B. R. Restitution made formerly by a French-Man; who had regained an English prize out of the hands of a Dutch-Man of War.

Hujusmodi res non tam capta, quam recepta, intelligitur: per D. Leg. Pomponius, & per Leg. in Bello Par. si quis servum in pr. de Cap. & post. Per Leg. postliminium, Par. Postliminio. de Capt. & postli.

XVI. He that is an Enemy, may every where be assaulted, according to the Laws of Nations. Enemies may therefore be attacked or slain on our ground, on our Enemies, or on the Sea; but to assault, kill, or spoil him in a Haven or peaceable Port, is not lawful; but that proceeds not from

Sir Walter Ra-
leigh l. 5. c. 3.
§. 17.

from their persons, but from his right that hath *Empire* there, for Civil Societies have provided that no force be used in their Countries against men, but that of Law, and where that is open, the right of hurting ceaseth. The *Carthaginian Fleet* was at Anchor in *Syphax Port*, who at that time was at peace with the *Romans* and *Carthaginians*; *Scipio* unawares fell into the same Haven, the *Carthaginian Fleet* being the stronger, might easily have destroyed the *Romans*; but yet they durst not fight them. The like did the *Venetian*, who hindred the *Greeks* from assaulting the *Turkish Fleet*; who rid at Anchor in a Haven, then under the Government of that *Republick*; so when the *Venetian* and *Turkish Fleet* met at *Tunis*, though that very Port acknowledges the *Ottoman Emperour*; yet in regard they are in the nature of a *Free Port* to themselves, and those that come there, they would provide for the peace of the same, and interdicted any hostile attempt to be made there.

History of the
Republick of
Venice in Anno
1638. and fol.
447.

The *Corfaires* having been in the *Gulph*, put into the Port of *Vallona*, which is subject to the Turk: whereupon *Capello*, Proveditor General for the *Venetian*, and Captain of the *Gulph*, having notice of the same, made into the Port; and though the *Ottoman Port* had by Treaty permitted the *Venetians* to pursue the Pirates in all places, and forbad their Commanders to protect or shew them any favour, yet the Castle interdicted, and forbad the *Venetian General* with Cannon to attack them; for it was nevertheless intended by the Treaty that the peace of Ports must be preserved.

Fuller's Holy
War l. 4. c. 23.

And the same Republick having War with those of *Genoa*, met at *Tyre*, *Reinerius Zenus* Duke of *Venice* with the united Power of the *Venetians* and *Pisans*, counting no fewer number than 74 Vessels well provided, and would have engaged in the very Haven, but were there interdicted by the Governour; but yet with this Proviso, that if by consent they would go out of the protection of the Port, and at open Sea decide the cause, they had their freedom: and accordingly they sailed forth and engaged. The like not long since happened between *Cornelius de Wis* Commander of a Ship of War of the *States General*, & Captain *Harman* Commander of one of His Majesty's Frigats at *Cales*, a Challenge being made in that Port by the first, and as briskly accepted by the latter, but both were interdicted the

the execution of the same in the Port. but out of the protection of the same they might decide the question; the which they did to the no small Fame of the last; for in that dispute, of 380 men then aboard the *States Man* of War there were scarce 100 whole men in her, and *Harman* having entred and taken her, brought her at his Stern in Triumph to the Port again. June An. 1672.

But they of *Hambrough* were not so kind to the *English*, when the *Dutch Fleet* fell into their Road, where rid at the same time some *English Merchant-Men*, whom they assaulted, took, burnt and spoiled: for which action, and not preserving the peace of their Port, they were by the *Law of Nations* adjudged to answer the damage, and I think have paid most or all of it since. But Enemies in their own Ports may be assaulted, burnt or destroyed by the Law of Arms. Anno 1665,
1666. Bell.
Angl. cum
Batavi.

conservanda sunt Jura Belli. Reg. fol. 129. Arrest. fact. super bonis Mercator. alienig.

XVII. If the Ships of any Nation happen to arrive in any of the King of *England's* Ports, and afterwards, and before their departure a War breaks out, they may be secured, priviledged without harm of Body or Goods; but under this limitation. till it be known to the King, how the Prince or Republick of those, whose Subjects the parties are, have used and treated those of our Nation in their Ports. But if any should be so bold as to visit our Ports after a War is begun, they are to be dealt with as Enemies. Some of old
have held that
Clericum, Agri-
cola & Merca-
tor tempore belli
ut celat commu-
tes, oreque pace
fruantur. Co. 2.
Instit. fol. 58.

XVIII. By the Laws of Nations generally all things are the Captors which he takes from his Enemy, or which his Enemies gained from another by Force of Arms; so likewise all those Goods that he shall find in his Enemies custody: but then it must be apparently manifest, and evidently proved, that it is really the Enemy's; for if an *English-Man* should have Goods in the custody of a *Dutch Factor* at *Cales*, and a War should break out between that Prince and that Republick, yet are not the Goods of the *English-Man* subject to the seizure of the *Spaniard*, it being apparent, that the owner is not a Subject of their Enemies: So likewise if the Goods of *Friends* are found in the Ships of *Enemies*, this does not *ipso facto* subject the same to be prize by the Laws of Nations; though it be a violent presumption, Consul. Maria
c. 273.

Hostis sit ille, & qui intra praesidia ejus sunt :
 Let him be our Enemy, and they that are within his Guards. *Liv. lib. 37. & alibi passim.*

Gregor. lib. 9.

Romani nos honestissimas eas atque justissimas

credimus possessiones quas Belli Lege captas habemus ; neque verò induci possumus ut stulta facilitate deleamus virtutis monumenta, si eas illis reddamus, quibus semel perierunt : imo tales possessiones, non tantum cum his qui nunc vivunt civibus nostris communicandas ; sed & posteris relinquendas censemus : tantum abest ut parta relinquendo in nos ipsos ea constituamus, quæ in Hostes constitui solent : Titus Lælius his opinion in the Senate of Restitution :
 We Romans believe those possessions to be most honourable and just, which we have taken by the Law of War ; nor can we be induced by a foolish facility to part with the monuments of our Valour, and restore them to those that were not able to keep them : nor do we judge such possessions to be communicated only to our Country-men now living, but to be left to our Posterity. So far are we from relinquishing what we have got, and dealing with our selves, as if we were our own Enemies. *De Veij. idem in B-mulo narrat Plutarchus.*

sumption, and may justly bear a legal examination, till which there may be a securing of the prize, till adjudication shall pass. So on the other hand, if the Ships of Friends shall be freighted out to carry the Goods of Enemies, this may subject them to be prize, especially if the Goods shall be laden aboard by the consent or privity of the Master or Skipper ; though in France they have subjected and involved the innocent with the nocent, and made both of them prize. In the late Flemish Wars with England the Ostenders became obsequious serviceable with their Ships to the Traffick and Commerce of both Nations. Memorable was the action, when the War was between the two Republicks, Venice and Genoa, the Grecian Ships being then employed, (as those of Ostend) were searched, and the Enemies pulled out, but no other matter done: however it is most certain, let the Commission or Protection of such Ships be what they will, if men will venture to trade under such a cloak, it behoves them, that the Skipper and his Crew be entirely ignorant ; for it is his action that will go far in the freeing, or making absolute the prize, and Goods so made prize, the property is immediately gone and changed, be the Owner who he will, he never can claim the same ; for the Laws of Nations made the Enemies first Masters by external Dominion, and then by Conquest gave the property to the Captor : following that Judgment of the Romans, Whatsoever they got of their Enemies by Valour, they would transmit to their Posterity by right.

XIX. 'Tis not against nature to spoil the Goods of him, whom it is lawful to kill ; and by the Laws of Nations it is permitted that the Goods of Enemies may be as well spoiled

ed as taken; and *Polybius* observes, That all things of the Enemies may be spoiled, their Ships, Goods, Forts, &c. *Hist. 5.*

XX. And though it may happen sometimes, that a War may break out, and there may be no publick denouncing or proclaiming the same; that if a Friend or Neuter should assist an Enemy with *Contraband Goods*, that is, Arms, &c. whether upon such a caption the Goods may be made prize; the resolution of which will depend on these Considerations. *3 Elix. in C. B. Owen's Report, fol. 45. but quere of that Case.*

First, By Natural Law, where either force offered, is repelled, or punishment exacted of one that hath offended, and is denied there needs no denunciation; for Princes are not to stand debating with words or arguments, being injured beyond words: For War undertaken to resist violence, is proclaimed not by an Herald, but by Nature: for it is no more than the invading of one for another, or taking of the Goods of the Debtor, to answer the Creditors damage. *Grotius lib. 3. cap. 3. § 2, 3.*

Secondly, *Interpellation* is introduced by the Laws of Nations, whereby Princes or Republicks, having received injuries, may apparently shew that they had no other way to recover their own, or that which is due to them: for such *Interpellation* following after injuries committed, constitutes that Prince or State in a fault that shall not render satisfaction. *Vide Marianam 27. 13.*

Thirdly, Admitting that *Interpellation* hath gone, and satisfaction hath been required for the damage, and no satisfactory return hath been made, whether then the Ships or Territories of the Enemy may be assaulted: and for that it has been conceived they may, for denunciation is no more but to signifie that the parties, against whom the same is commenc'd, are unjust, and will not do right, and therefore War is begun by the Supreme Power. Now Princes or Republicks having done that which by the Law of Nature they were not obliged to do, that is, after a wrong done, abstained from War by friendly demanding of satisfaction or reparation (which is required only by the Laws of Nations) and publick Justice being denied them, there remains no other or further obligation on the State, the same amounting to, and indeed is an apparent defiance; and Proclamation is no other. Denunciation is either conditionate or pure: Conditionate where it is joyned with remanding of things, and in the name of *res repetita* the Heralds Law, called *Jus sociale*, comprehend- ed not only vindication by right of Domi- nion, but also the prosecuti- on of that which is due upon a Civil or Criminal Cause. *Suerius.*

—ad 10. *En.* explains it rightly, thence was that in the Forms to be rendered, to be satisfied, to be yielded, where to be yielded, as we have said elsewhere, is to be understood, unless they that are called upon will rather punish the guilty themselves: this requiring of things *Pliny* testifies was named Clarigation, lib. 8.

* The throwing of the Spear and such sort of Customs which did not belong to the Law of Nations, which in

process of time became obsolete, nay the third *Punic* War was at once indicted and begun. *Varro* lib. 4. de l. * *Phil. Arlanibæus Arma Suecica* fol. 13. 37. *Zouch de Jure Fœciali* part. 2. sect. 10. qu. An bellum aliquando omiſſa indiſtione movere liceat?

Diffidato Principe, diffidati sunt ejus adherentes. Baldus ad Leg. 2. C. de Serv. n. 70.

Liv. lib. 36.

XXI. True it is, that while the *Romans* were uncorrupted in their Discipline, they were religiously scrupulous in beginning a War; for they never sent forth their Armies till they had sought for Justice in the tracts of Peace, and after the publick promulgation of their intent. Such also was the integrity of the *Achaans*, before they had forewarned the Enemy to a defence. *Machiavel* commends the simplicity of the ancient *Florentines*, that enterprised no Hostility on their Neighbours till they had by ringing a Bell for the space of a whole month, summoned them to a peaceable satisfaction or a brave resistance: but these Customs and Institutions are only of some Countries, not from the Law of Nations; the white Rod among the *Greeks*, the Turff and bloody Spear among the *Equicols*, renunciation of Friendship and Society (if there had been any) thirty solemn days after satisfaction demanded, * are rather introduced by that which we call the Custom or Law of particular Kingdoms and States; for there may be War no question introduced, without any solemn Proclamation, as the violation of Ambassadors by approbation of publick Authority is an open denunciation of War, and upon the same reason *Gustavus Adolphus* invaded * the *German Empire*, without ever declaring War, to revenge the contumelious usage of his Ambassadors at *Lubeck*.

XXII. But if War be indicted, or is begun against him who hath the highest Power over the people, it is supposed to be proclaimed against all his, not only Subjects, but those who will joyn themselves unto him, as being an accession to his party. And this is that which the Law interprets, the Prince being defied, his adherents also are defied; for to proclaim a War is to defie, which is to be understood of that same War which is waged against him to whom it is indicted, as when War was denounced against *Antiochus*, they were not pleased to denounce it against the *Ætolians* apart, because they had openly joyned themselves with *Antiochus*: the Heralds answered, *The Ætolians have declared War of their own accord against themselves;*

but

but that War being ended, if another People or King, for supply of Aids, is to be warred against, that the effects of the Laws of Nations may follow, there will be need of a new Indiction; for now he is not lookt upon as accessary, but principal: wherefore it is rightly said, That by the Law of Nations, neither the War of *Manlius* upon the *Gallo-Greeks*, nor of *Cesar* upon *Ariovistus* was lawful. For they were not assaulted now as an accession of a Neighbour War, but principally: to which purpose, as by the Law of Nations Indiction, so by the Roman Law a new Command of the Roman people was necessary. For what was said in the proposal against *Antiochus*: Was it their will that War should be entred with King *Antiochus* and those that followed his Party (which was observed also in the Decree against King *Perseus*) seems truly understood so long as the War continued with King *Antiochus* or *Perseus*, and of those that really immixed themselves in that War.

XXIII. Now the true reason wherefore Nations required Denunciation to that War which was said to be just by the Law of Nations, was not that Force should be offered privately, or carried on by deceit, for that pertains more to the excellency of their Valour than to strict Right; (for some Nations (as we have read) have appointed their Enemy the time and place of Battel) but that it might certainly appear the War was not waged by a private undertaking, but by the will of either people or their Heads. *Servius Honoratus* when he had deduced the Original of the Heralds Law from *Ancus Manlius*, and further from the *Aquicola*, saith, That if at any time men or beasts were by any Nation taken from the people of Rome, the Pater Patratus went with the Heralds (that is, Priests) who have Authority in making of Leagues, and standing before the bounds, with a loud voice pronounced the cause of the War; and if they would not restore the things taken, or deliver up the Authors of the injury, he threw a Spear, which was the beginning of the fight, and thenceforth it was lawful, after the manner of War, to take the Spoil.

XXIV. As War is not only lawful against those that are our Enemies, but likewise against those that supply them; but yet we must distinguish of the things themselves. For some things there are that have use only in War, as Arms: some that have no use in War, as those

Idem dici potest de bello sociorum Ulyssis in Cyclo- nas Priamo quondam auxiliatos, de quibus Hom. Odys. 1. & ibi Didymus.

Livius lib. 36. 42.

Tum certare o- diu, tum res rapuisse licebit

Of Ships of War.

that serve for pleasure; some that have used both in War and out of War, as Money, Corn, Victuals, Ships, and things belonging thereto.

1. It is plain, that by the first he is my Enemy that supplies my Enemies with things necessary for the War.

French & Dutch in enmity, and the English neuter with both, the latter permitted the French King to build a Vessel of Pleasure at Portsmouth, which was sent into France, & was no breach of the Neutrality, Anno 1676.

** Grotius in iure Belli & Pacis lib. 3.*

2. But by the second he is not, according to that of Seneca: *I will not help him to monies to pay his Guards; but if he shall desire Marbles and Robes, such things hurt not others, only they minister to his luxury: Souldiers and Arms I will not supply him with; if he shall seek for Players and recreations to soften his fierceness, I will gladly offer to him: Ships of War I will not send him, but such as are for pleasure and ostentation of Princes sporting in the Sea.* I will deny to give to one that purposes the destruction of anothers Country those things that are essential, for it is a bounty not to be allowed of.

3. But in the third, which is a doubtful use, there the state of the War is to be considered: For if I cannot defend my self unless I intercept the things sent, necessity will then give right, but with the burden of restitution*, except some other cause accede; but if the apportation of those things hinders the execution of my right, and he could know so much who brought them, as if I had driven the Enemies Fleet into a Port or Haven, or had straitned a Town with a Siege or Blocade, and were now in expectation of their yielding or compounding, there is no question but he that shall in such case succour my Enemy, ought in Justice be made liable for the damage I have sustained through his means: like a Gaoler that shall wilfully suffer my Prisoner to escape; or one that hath rescued my Debtor justly detained by me for my damage whereby I am injured, and according to the measure of my loss his Goods also may be seized and brought into such a state, to the end I may obtain a just satisfaction. But if he hath not yet done any damage, but hath been willing to do it, there will be a right by retention or staying of the Ship and Goods to compel him to give caution for the future; but if my Enemies injustice towards me be most evident, and a Nation that ought to be neuter confirm him in that most unjust War, in that case it will not only Civilly be liable, but Criminally as one that rescues a Pirate manifestly guilty from the Judge at the very Bar, and therefore it will be lawful to determine against him

The English drive the Dutch East India Fleet into Bergen, and the Dane there protecte them against the League and the Laws of Nations, for which the ensuing War was accounted just on the King of Britain's part. Sylv. in verb. Restitut. pag. 3. §. 12.

by such measures as are necessary and meet for his offence, wherefore within those rules, he may be spoiled of Ship and Lading; and that is the true reason wherefore Indiction or publick Proclamation by internal right ought to be denounc't, that so other Nations may see they have a just cause who commenc't the War, and that they ought not to be impeded in the acquiring due satisfaction.

And though Neuters are not compellable, by the rigor of War, to afford assistance to either Party without the will of the other, yet such may the emergency of the case be, that if enforced, they may lawfully declare, though to the damage of the weaker. Such was the case, when the *Venetians* had so far prevailed against the *Turks* in *Candia*, that *Canea* which they then besieged by Sea and Land, was brought to that extremity, that in all humane probability it must then have been speedily surrendred, the *English* Ships being then at *Smyrna*, and prest by the *Turk* to assist the *Grand Signior* in the relief of that City. If the persons whom the *English* had thus assisted, had been Christians, there is no question this Auxiliary aid had been well; but to assist an Enemy of Christianity against Christians themselves hath seemed doubtful: but surely there seems little reason for such an ambiguity; for if it be lawful to make League with those that are Aliens from the true Religion by the Law of Nature, then there can be no doubt but they may be aided. Now by the Law of Nature they may be entred into by Christians with such, for that Law is so common to all men, that it admitteth not any difference of Religion: nor was the same universally forbidden by the *Hebrew* Law, as appears by *Abraham's* aiding the wicked *Sodomites* with his Arms; and that which was very remarkable, that the *Asmonians* being exceeding skilful in the Law, and great Observers of the *Hebrew* Rites, yet made they Leagues with the *Lacedemonians* and *Romans* by the consent of the Priests and people, yea and publickly offered Sacrifice for their safety: nor were they forbidden by the Evangelical Law, according to that of *Tertullian* who observes, That so long as *Israel* was only his people, God did justly command mercy towards their brethren alone; but after that, he gave unto *Christ* the Nations for his inheritance, and the ends of the Earth for his possession, and that began to be

Laus eorum in Thargum.

Vid. Carolum Molin. tract. 2. disput. 112.

Lib. 7. ch. 3.

Vide the Case at large in the end of this Chapter.

Jus feciale.

Vide Treaty

1. Dec. at London 1674. Art. the third, what is meant by Goods Contraband, or prohibited Merchandize.

Camden. vide ann. 1589, 1595.

Plutarch.

Mourfius in his Danish Hist.

1. part 2.

paid which was promised in *Hosea*, *They that were not my people shall be my people, and the nations that had not obtained mercy shall obtain mercy*; From that time Christ hath extended unto all the Law of fraternal benignity, excluding none from our Compassion, no more than from his Vocation: from whence it follows, that the action of those Captains being then in the power of the *Turk*, was lawful in the assisting them against the *Venetians*.

XXV. And although the Goods of Friends, according to the circumstance of the case, may be preserved by adjudication, and restored to their Owner; yet all manner of Goods have not that privilege: for though the *Freedom of Trade* preserves the Goods of Friends against the rigor of War, yet it does not those Goods that supply the Enemy for War, as *Money, Victuals, Ships, Arms, and other things belonging thereto*; for to supply an Enemy that invades our right, or seeks the destruction of our Countries, is a liberality not to be allowed of, and it certainly stands with necessity, that if I cannot safely defend my self, or endamage my Enemy without intercepting the things sent, it may justly be done: but when such Goods are seized, whether they give the Captor a right of property, or a right by retention, to compel that neuter Nation to give Caution for the future, by *Hostages* or *Pledges*, not to supply the Enemy, may be a question. The *Romans*, who had brought Victuals to the Enemies of *Carthage*, were taken by the *Carthaginians*, and again rendred upon request; the *Hollanders* in the heat of the War between *Sweden* and *Poland*, never suffered themselves to be interdicted with either Nation; the same State when they had War with *Spain*, intercepted the *French* Ships, passing to or for *Spain*, but restored them.

And *Pompey*, in the History of the *Mithridatick* War, set a Guard on the *Bosphorus*, to observe if any Merchant sailed in thither; whosoever did, and was taken, was surely put to death; so *Demetrius* when he possessed *Attica* with his Army, having blockt up *Athens*, hanged up both the Master and Commander of a Ship, who attempted to bring in Corn: the *Hollanders* having blockt up *Dunkirk*, some *English* Merchants Ships did attempt to enter, but were denied by the *Hollanders*.

Most certain, if a *Neuter Nation* hath had notice of the War, and Caution given them (as is usual) not to supply the

the Enemy with Counterband Goods, as they call them; if such be the case, the prize is become absolutely the Captors. So Queen *Elizabeth* did, when she seized on the 60 Sail of the *Hanſiatick Towns*, who were carrying of Goods, *ropas contrabanda*, to the *Spaniard* her Enemy; she condemned them, and made them absolute prize; For as *Neuters* are not compellable by the rigour of War, to give any thing against their will, so must they not against the will of each Party afford such things as may damage one another. For Persons or Nations having had notice of the War, which is done, and Caution given sometimes by Proclamation, or some other publick Edict, signifying the right of their Cause, and shall afterwards gather to, and assist the Enemy, whether Associates, Neuters, or Subjects, the same yields a right, so far as to them, not only to the charge and damage that may fall thereby, by making them prize; but may make them obnoxious to punishment: For it is the duty of those that abstain from War to do nothing for the strengthening of him who maintains a bad cause, whereby the motions of him that wagem a just War may be retarded; and where the cause is doubtful, they ought to shew themselves equal to both, permitting passage, baking, dressing and affording provision for each Army or Navy.

Balls, Powder, Matches, Bullets, Pikes, Swords, Lances, Spears, Holberts, Guns, Mortar-Pieces, Petards, Granadoes, Musket-rests, Bandaliers, Salt-peter, Muskets, Musket-shot, Helmets, Corlets, Breast-plates, Coats of Mail, and the like kinds of Armature; so for Horses and other warlike Instruments. *Vide Marine Treaty between England and Holland, Decemb. 1. 1674. Art. 3. Vide the Attempt made by John Burrough to trade with the Swede expressly against the interdiction of the Danish King: Sir Walter Raleigh, l. 5. c. 1. § 10.*

L. Amilius Prator accused the *Tejans* for victualling the Enemy's Navy, promising them wine, adding, That unless they would do the like for the Navy of the *Romans*, he would account them as Enemies: but common experience hath taught Nations and Kingdoms, when they declare Neutrality, to make provision by way of League with both the Nations at War, that when it should happen the Armies of both, or any draw towards their Territories, it might be lawful for them to exhibit the Common Offices of humanity to both.

It happened that about seven stout Merchant Men rode in the Port at *Smyrna*; the General of the *Vene-*

Bald. ad l. 2. c. de Sev. n. 70. Under the name of Contraband may be comprehended Arms only, as pieces of Ordnances, with all Implants belonging to them, Fire-

So likewise it is Ships, Masts, and whatsoever shall be thought or ascertained capable of Arming an Enemy. *Barol. l. nullus nunc. lib. 2. de Jureis Calice. l. 6.*

Of Ships of War.

Anno 1650, or
1651. vide R.
Cooke of the
Church's state
in equal dan-
ger with the
Trade.

tians being jealous of their joining with the *Turkish* Armado, desired to know their minds, who answered, they would prove Neuter in the dispute; but afterwards (though at first the Captains all refused) upon the threatening of the *Grand Signior*, to lay an Embargo on all the Goods of the *English* Nation in his Dominion, and to make slaves of their persons; those Captains were forced to join with the *Turkish* Forces, who beat the *Venetians* from before *Canea*, and so relieved it; the *Venetians* Ambassador complained to the then Powers in *England*, but could have no relief, being answered, *That those Ships being in the Turks power, were subject to it*, the accident being such as made the action lawful, as we have afore remembred.

CHAP.

C H A P. II.

Of Letters of Marque and Reprizal.

- I. Of Reprizals generally considered, and for what causes awarded.
- II. Whether unlawful by the Law of Nature and of the Roman Law.
- III. Where lawful by the Laws of Nations at this day, and the reasons wherefore they are so received.
- IV. Of the advantages that accrue universally by such Reprizals.
- V. Of the essential causes or grounds generally for the awarding Letters of Reprizals.
- VI. Of the essential causes or grounds particularly that are requisite before they can be awarded by the Laws of Nations and of this Realm.
- VII. Of the ordinary and extraordinary by the Laws of England.
- VIII. Whether the same creates a debt in the Grantee, and whether the Execution may be suspended.
- IX. Whether the awarding the same amounts to a breach of Peace.
- X. Of Letters of Reprizal extraordinary where granted, and of what force.
- XI. That it consists with the Interest of Princes, not only to prevent those things that may occasion Reprize, but likewise not to deny the same, if there be ground sufficient.
- XII. The difference of Injustice offered to Subjects and to Foreigners, and where the one is concluded by the same and not the other.
- XIII. What is meant by denying of Right and doing of Injustice, and where Reprizal takes rooting, and where not.
- XIV. Of Reprizals where awarded, for denying of common Justice, or those which are called Letters of Marque in cases ordinary.
- XV. Not repairing the damage after

Letters of Request creates a National debt, and is the foundation of Reprizal.

- XVI. Domicil not Origination subjects to Reprize.
- XVII. Reprizal not grantable, if the spoil was occasioned by War.
- XVIII. Of persons exempted from Reprizal by the Laws of Nations, Canon and Civil Law.
- XIX. Where Ships and Goods are subject to Reprize, and where not.
- XX. When Right is denied, whether life is engaged, and whether persons refusing to yield may be slain.
- XXI. Goods taken by Reprize where the property is altered, and where not.
- XXII. Where many Ships are present, and one becomes Captor, whether the spoil must be divided, or remain his that became Master of the Prize.
- XXIII. Where the Grantee of Letters of Reprizal may become a Pirate notwithstanding such Commission.
- XXIV. Where a mis-capture creates not an injury in the Grantee, nor subjects him not to answer damage to the sufferers.
- XXV. Of the Duties incumbent upon the Captor, and whether the Goods taken are subject to pay Customs.
- XXVI. After the debt and damage satisfied, restitution of the residue ought to be made.
- XXVII. Contribution, whether it can be by the Laws of England to him whose Goods are taken by Reprize.
- XXVIII. Where Commissions have been awarded for the inquiring of Depredations, under which the Parties have sometimes obtained satisfaction.

I, **R** Eprisals known to us by the word *Reprisalia*, or Letters of *Marque*, in Law have other appellations,

as *Pignoratio*, *Clarigatio* and *Androlepsia*, &c. in imitation of that *Androlepsia*, among the *Greeks*, to seize the three next Citizens of that Place, whither the Murderer had fled, and was always given to him who required revenge of the Offender; the word (*Reprisals*) is from the *French* *repandre* and *reprise*, i. e. *resumptio*, that is, to re-take or take again one thing for another, like our *Saxon* *Witbernami*. Though the Act is now become lawful by the Law (indeed *consent*) of *Nations*, yet must it have its Standard-mark, for the same cannot be done by any private authority, but only by the power of that Prince or Republick, whose Subject the injured person is; nor is the same grantable by Authority, but where the party injured has *Justice* denied him, or the same *illegally* delay'd.

Reprisals are all one, both in the Common and Civil Law: *Reprisalia est potestas pignorandi contra quemlibet, de terra debitoris data creditori pro injuriis & damnis acceptis, vocabular. utriusque Juris.* 27 E. 3. Stat. 2. cap. 17.

II. By the *Law of Nature* no man is bound for another's Act, but only the Successor of his Estate, for that Goods and Estate should pass with their *Burthens*, was introduced together with the *Dominion* of things; hence it is that the Son cannot be molested for the debt of his Father, * neither the Wife for the debt of the Husband, nor the Husband for the debt of the Wife; the same being against natural equity, that one should be troubled for the debt of another.

* *Leg. unica, c. ut null. & vicinis. c. ne uxor pro mar. & ne fil. pro patre, totis rit.*

Ulpian. Leg. si cut se<. quod cuique univers. nom. Et: singuli debebunt non tanquam proprium, sed tanquam publicum publici partem. Seneca lib. 6. de Benefic. c. 20. & cap. 19.

* *Leg. nullam, c. de Execut. & Exactionibus.*

So it is, that no particular men owe, or are obliged for the debt which the *Community* owes, that is, if the *Community* have any Goods; but if Money be lent to a *Community*, each particular is naturally bound, as they are a part of the whole, if the Stock publick be wanting. If one lends my Country Money (says *Seneca*) *I will not call my self his debtor, yet will I pay my share.* And again, *Being one of the people, I will not pay as for my self, but contribute as for my Country.* Naturally, nay, by the very *Roman Law*, * one Village was not bound for the other, nor one mans Possessions charged for another; no not so much as with the debts publick: the reason being added, *That it was against reason for one to be charged with the debt of another.*

III. And though by the *Law of Nature* one mans Goods are not tyed for the debts of another, no nor for those of the *Publick*; yet by the voluntary *Law of Nations*, the same

same might be introduced and brought in, and the same may stand well with the *Laws of Nature*; for that might be introduced by custom and tacit consent, when even Sureties without any cause, may subject and make liable their Goods and Estates for the Debts of a Stranger. So likewise that for any debt, which any *Civil Society*, or the *Head* thereof ought to make good, or because the *Sovereign* or a *Head* hath not done right in anothers debt, but hath made himself liable to render satisfaction; such a *Society* may oblige and make liable all their Goods corporeal or incorporeal, for the reddition of satisfaction. Hence it was, as the Great *Justinian* observes, That this custom was constituted by the *Nations*, grounded on the urgency of humane needs, asserted with the greatest of necessities: since without this, great licence would be given and tolerated for the committing of depredations and injuries; especially if only the Goods of Rulers were made liable, who seldom possess any thing, that for satisfaction, the injured may easily come by, whereas those private men, whose Commerces are various, may be catcht for recompence, sometimes with the greatest of ease, and freest from danger. Besides, the Owners of such prize being members of the same *Society*, might more easily obtain mutual right for satisfaction of the injured, and their own future indemnity than Foreigners could, who without such a Tye would be very little regarded.

In Nov. Just. 52.
134. C. unico de
injuriis in sexto.
Just. Inst. de Jure
Nat.

Baldus 3. conf.
58. Bartol. de
repress. q. 5. ad
ternum 9.

IV. Besides, the benefit of this obligation was common to all Nations, so that they which were one time grieved with it, another time might be eased by the same. Moreover that this custom was received, appears not only out of full Wars which Nations wage against Nations (for in these what is observed may be seen in the Forms of the ancient Denunciations. *Populis priscorum Latinorum, hominibusque, priscis Latinis bellum indico facioque.* So likewise in the Proposal: *Vellent. juberent Philippo Regi Macedonibusque, qui sub regno ejus essent, bellum indici.* And in the very Decree or Proclamation it self: *Populus Romanus cum populo Hermundulo hominibusque, Hermundulis bellum jussit* but also where Wars are not come to that fulness of War, yet there is need of a certain violent Execution of Right, that is imperfect War. *Agessilaus* of old said to *Pharnabazus*, a Subject to the King of Persia: *We, O Pharnabazus,*

Liv. lib. 1.

Lib. 31.

Gellius lib. 16.
cap. 4.

Phinarch Agessila.

Zus,

*Archæologie
Attica.*

*Herod to whom
it was not law-
ful to make war
against the A-
rabians, might
lawfully use
pignoration.
Joseph. lib. 6.*

Liv. lib. 34.

*C. Si sententia
c. 16. de Sent. ex-
com. in 6. constit.
Leg. qui restituere,
de rei vindic.*

thus, when we were the Kings Friends, carried our selves like Friends towards all his, and being now become his Enemies, we carry our selves like Enemies; wherefore seeing you will be one of the things that are his, we do justly oppose him in you. A Species of this sort of Execution by Reprizal was that which the Athenians called Apprehension of men, of which the Attick Law (as Mr. Roux observes) *If one have force offered him and dye; his Kinsmen and Friends may apprehend men, till either the Manslayer be duly punished or yielded; but it is lawful to apprehend three men and no more.* By which it plainly appears, that for the debt of the City which is bound to punish her Subjects that have hurt others, is tyed a certain incorporeal right of the Subjects, that is, the liberty of staying where they please, and doing what they will: So that such persons so taken, by that Law might be made Slaves until the City did do that which by Law she was obliged to perform. In like manner to recover a Citizen taken Captive by manifest injury, are the Citizens of that City, where the injury was done, retained by Reprize. Wherefore at Carthage they would not suffer Ariston the Tyrian to be taken; for, said they, *the same will befall the Carthaginians at Tyre, and in other Towns of Trade, whereto they often resort.*

V. A due administration of Justice is not the least sense, wherein Princes are stiled Gods: To deny or delay Justice, is injustice; Justice is every man's right who hath not forfeited what he might claim by the *Jus Gentium*.

If therefore the Party cannot obtain his Definitive Sentence or Judgment, within a fit time against the person of whom he complains, or if there be a Judgment given against apparent Right and Law; yet if no relief can be had, the Bodies or Moveables of his Subjects, who renders not right, may be taken.

VI. In the prosecution of which there must be,

1. The Oath of the Party injured, or other sufficient proof, touching the pretended injury, and of the certain loss and damage thereby sustained.
2. A proof of the due prosecution for the obtaining of satisfaction in a legal way.
3. Protelation or denial of Justice.
4. A complaint to his own Prince or State.
5. Requisition of Justice by him or them, made to the Supreme Head or State, where Justice in the ordinary course was denied.

6. Persu.

6. Persistency still, in the denial of Justice.

All which being done, Letters of Reprizal under such cautions, restrictions, and limitations as are consonant to Law, and as the special case may require, may issue not only by the *Jus Gentium* and *Civile*, but by the ancient and Municipal Laws of the Kingdom *.

* *Magna Charta* C. 30. the latter Clause.

Claus. 4. Johan. Reg. m. 22. Pat. 15. E. 3. part. 2. dorf. 48. Pat. 23. H. 6. part. 2. dorf. 14, 15.

VII. The *Reprizals* grantable by the Laws of England, are of two sorts, *Ordinary* and *Extraordinary*. The *Ordinary* are either within the Realm or without, and are always granted where any *English* Merchants or their Goods are spoiled, or taken from them, in parts beyond the Sea by Merchants Strangers, and cannot upon Suit or the Kings demanding of Justice for him, obtain the same, he shall have upon testimony of such prosecution, a Writ out of the *Chancery*, to arrest the Merchants Strangers of that Nation their Goods here in *England*; the which is grantable to the Subject oppress of *Common Right*, by the *Chancellor* or *Keeper* of *England*, who always in such case hath the approbation of the King or Council, or both, for his so doing; the other, which is for satisfaction out of the Realm, is always under the Great Seal.

Fitz. H.N. Bre. fol. 114. Reg. 129. Pat. Rolls 14. 14. H. 6. par. 1. dorf. 15. 17. 22. & M. 5, 6, 7. par. 2. dorf. 18. 22 E. 4. par. 2. M. 25. dorf. 2. & 4.

VIII. But Letters of Reprizal granted in the *Ordinary* way for reparation out of the Realm, which are always under the Great Seal of *England*, cannot be revoked, (though perhaps in point of State there may be a suspending the Execution of them for reason grounded on the publick good) and the reason wherefore they cannot be annulled or revoked is, because after the person injured hath petitioned, and hath according to Law made out by proof his loss, and Letters of Request have gone. and no reparation made, then the Letters Patents of Reprizal being sealed, the same does immediately create and vest a National debt in the Grantee to be satisfied in such manner and by such means as the same Letters Patents do direct out of the Goods and Estates of his Subjects, who refuses or protelates to do right (however as the King hath the Legislative power of Peace and War in a publick Treaty for the Nations good, they may be mortified, and then revok'd by the Great Seal in pursuance of that Treaty.)

Leg. qui restituere de rei vindic.

Vide Treaty 1666. Breda Art. 5.

Nor

Of Letters of Marque and Reprizal.

Nor do I see it an Act unjust internal to deny the Execution of such Letters Patents, according to that of *S. Paul*, *All things are lawful for me, but all things are not expedient*. Now to the true interpretation of the word *lawful* strictly, it is to do a thing without violating the rules of Piety and Charity. Now there are many things amongst men which are not internally just, and cannot be done without violating the Laws of Charity, yet are lawful to be done, as in the Law of the *XII. Tables*, the Creditors might divide the Debtors Body amongst them. So in acquiring satisfaction for damages, the Lives & Goods of Innocents may be involved in death and destruction, whose peaceable Tract in Commerce never gave them knowledge of this *privatum Bellum*, nor were they Actors in the injury original. 'Tis true externally, according to that of *Lucan*, *That Prince or State that denies me right, gives me all*. But the incomparable *Cicero* observes, *That there are some offices to be done to them from whom you have received an injury, for revenge and punishment must have a measure*. Now if the Supreme Power does think that the Execution of such Letters of Reprizal cannot well be effected without endangering the Peace of both Estates, there may be a just cause to respite the Execution till a time more convenient may occur, for that the Lives and Estates of thousands may be involved in the repairing of one injury, private and peculiar: nor do I see the same to appear repugnant to the Laws positive that have been made for the awarding those Commissions. 'Tis very true the Statute * reciting, 'That at the grievous Complaints of the Commons of *England*, who had suffered many wrongs and injuries in the loss of their Ships and Goods upon the main Sea against Leagues, safe-Conducts, and Truces which were broken by the Subjects of other Nations, the same Parliament reciting their willingness to provide remedy and relief for the grieved by spoil and injuries done unto them beyond the Seas, upon Complaint to the Keeper of the Privy Seal (on full evidence shewn) he shall sign Letters of Request to demand restitution and reparation to the Parties grieved: which if not made in convenient time, then the Lord Chancellour of *England* shall grant Letters of Reprizal in due Form of Law for the Indemnity of the persons interess'd and injured. Yet this

Quintilian.

*Omnia dat qui
justa negat.*

*Cicero ipse orat
pro Balbo.*

*Est enim aliquid
quod non oportet,
etiamsi licet,
Idem pro Milone.*

* 4 Hen. 5. c. 7.

this does in no respect restrain the King's Prerogative and Authority, which he had at the Common Law in the judging the conveniency and time, when to be executed. Nor does the subsequent Statute *, reciting: 'Whereas divers * 14 Ed. 4.c.4.
'great offences were often committed against Leagues, 'Truces, and Amities between the King and other Prin- 'ces or States, against safe-Conducts and Licences, 'and against the Laws and Statutes of the Realm (in 'that case made and provided) to the great slander of our 'Soveraign Lord the King, and the damages of the good 'Subjects the Commons of England. It was therefore 'Ordained, Established, Enacted and Confirmed by the 'Consent of the Lords Spiritual and Temporal, and 'Commons Assembled in Parliament, That all Statutes 'and Ordinances against the Offenders of Leagues, Tru- 'ces, safe-Conducts, and Amities shall be in full force, 'excepting the Clause in the Act which made it High 'Treason in the second year of Hen. 5. Therefore it is plain there were Statutes made for the more effectual providing for the Subject, and Letters of Reprizals, they being granted long * before the Statutes, and the King's * Johan. Reg. memb. 22.
Prerogative not the least diminished, but remaining at Par. 15 Ed. 3.
the Common Law to judge when expedient. part. 2. dorf. 48.

IX. And since the granting of Letters of Reprizal does not, in the ordinary way for particular satisfaction, amount to a breach of the Peace, I have thought fit for the excellency and care that is had in the composing and framing of them, to recommend one that was granted upon Solemn advice, and for the reasons therein mentioned.

Vide S. 15. p. 1.
stea.

X. The Extraordinary are by Letters of *Marque*, for reparation at Sea, or any place out of the Realm, grantable by the *Secretaries* of State, with the like approbation, of the King or Council, or both; but they are only during the King's pleasure, and to weaken the Enemy during the time of War, and may at any time be revoked.

XI. As Princes by the Laws of *Nations* are responsible for injuries *publick*, so should they by the most prudent ways imaginable prevent those that are *private*, not suffering Foreigners, if possible, to receive wrongs in their Countries: For, as the *Florentine* observes, *If a man be exceedingly offended, either by the publick, or by any other private hand, in a Foreign Nation, and cannot obtain reparation*

Machiavel on his *Tir. Liv. C.*
A Prince in this later Age lost his Country but for a Load of Sheep Skins.
Philip Comines in *vita Caroli*
Ducis Burgund.

accord-

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according to Justice, he will never leave blowing the coals, or cease promoting the injury, till the flame break out into War; in which he cares not if he see the ruine of that Kingdom or State, where he received his wrongs.

Nor should the Prince or State of the person injured, value his misfortune at so low a rate, as to deny him Letters of Request, for that were to heap up injury upon injury; but likewise, if Justice be denied after such request, to arm him with power to take satisfaction by Reprise, *vi, manu & militari.*

Generally there always proceed Letters of Request, two or three, more or less; and according to the satisfaction sufficient or insufficient, returned in answer to the same, Commissions are awarded.

Res judic. pro veritate habetur; yet it is as true, Judex male judicans pro injuria tenetur.

Et cum per injuriam Judicis domino rem que debitoris non fuisset, abstulisset creditor, quasi obligatam sibi; & queritur an soluto debitori restitui eam oporteret; debitori Scævola restituendam probavit, Leg. scripturam l. de distr. pign.

XII. *Subjects* cannot by force hinder the Execution, even of an unjust Judgment, nor lawfully pursue their right by force, by reason of the efficacy of the power over them: But *Foreigners* have a right to compel, which yet they cannot use lawfully, so long as they may obtain satisfaction by Judgment. But if that ceases, then Reprizal is let in.

XIII. Now Judgment is obtained either in the *Ordinary* course, by way of *Prosecution*, or *Suit*, or *Appeal* from the same, after Sentence, or Judgment given, to a higher Court; or else in the *Extraordinary* way, which is by way of Supplication, or Petition to the *Supreme Power*: but we must understand that to be, when the matter in *controversie* is, *tam quoad merita quàm quoad modum procedendi*; not doubtful, for in doubtful matters the presumption is ever for the Judge or Court.

But the Reprizal must be grounded on a wrong Judgment given in matters *not doubtful*, which might have been redressed one way or other; either by the ordinary or extraordinary power of the Country or place; and the which was apparently *perverted* or *denied*.

But if the matter be doubtful, then otherwise; for in causes dubious or difficult, there is a presumption always that Justice was truly administered by them who were duly elected to publick Judgments.

* *Verus debitor, licet absque sit, natura tamen debitor permanet. Paulus Leg.*

XIV. And yet in this later case, some * are of opinion, that if the cause were dubious, and if the Judgment were against apparent right, the Stranger oppressed is let into *Julia. D. de cond. indebitor.*

his satisfaction; and the reason is, because the Judge's authority is not the same over *Foreigners*, as over *Subjects*, for the reason above-mentioned.

If an *English Merchant* shall prosecute a Suit in the Ordinary Courts of Law beyond Seas, and Sentence or Judgment shall pass against him, from which he appeals to the *Supreme Judgment*, and there the first Judgment or Sentence is affirmed, though the Complainant hath received a Judgment against the *real Right* of the Cause, yet this will be no cause for Letters of Reprizal, though perhaps it may occasion Letters of *Request* (if there be strong circumstances for the same) to have a rehearing of the cause.

But if an *English-Man* shall recover a debt there, and then the Officer having the Debtor in custody, will wilfully let the Prisoner escape, and then become insolvent, the same may perhaps occasion Reprizal.

In *England*, If a Foreigner bring an Action Personal against *I.S.* and the matter is found *special*, or *general*, and the Party prays Judgment, and the Court refuses it; and then the Defendant dies, and with him the Action, (the nature of it being such) the Party is here without remedy, the same may occasion Letters of Reprizals, if it be accompanied with those circumstances that evince an apparent denial of Justice, *i.e.* as putting it off from *Term to Term* without cause.

*Nulli vendemus,
nulli negabimus,
aut deferemus
justitiam,
Grand Charter
Cok. 2. Inst. 56.*

An *English-Man* pursues his Right in the legal Courts beyond Seas, and the Military Governour opposes the prosecution, and by force conveys away the Debtor and his Goods, the Sentence or Judgment is obtained: its ultimate end being *Execution*, being thus frustrated, may occasion Letters of Reprizal.

Case of slaughter, Lee against the Governour of *Leghorn* upon the Petition of *Gould* and *Canham* Merchants, in Nov. 1670. on which two Letters of Request were sent to the Great Duke of *Tuscany*, for redress.

XV. Persons murdered, spoiled, or otherwise dampnified in hostile manner, in the Territories or places belonging to that King, to whom Letters of Request are issued forth, if no satisfaction be returned, Letters of Reprizal may issue forth; and the Parties Petitioners are not in such cases compelled to resort to the Ordinary prosecution: But the Prince of that Country, against whom the same are awarded, must repair the damage out of his or their Estates, who committed the injuries; and if that proves deficient, it must then fall as a common Debt on his Country.

Such

* After the
Massacre at
Ambony, and
the other de-
predations

committed by the *Flemings* on the *English*, his Majesty in 1625. issued forth his Letters of Request to the States of *Holland*, for satisfaction within 18 months, otherwise Letters of Reprizal. *Vide Journals* of that year, and *Leo Aitzma* p. 48. 13. 41. 82. So likewise Letters of Request went to the King of *Spain*, requiring satisfaction for the depredation committed on the Ship and Goods of Mr. *Stampe*, who was spoiled and murdered at the *Havana*, Anno 1674. *Vide* the Proclamation 1675. of reward promised by his Majesty for the apprehending the Offenders dead or alive.

A Copy of Let-
ters Patents, for
Especial Repriz-
als from the
King of Great
Britain, (under
the Great Seal
of *England*) a-
gainst the States
General and
their Subjects,
inrolled in the
high Court of
Chancery.

19^o Maii 15^o
Car. 2.

CHARLES the Second, by the Grace of God, of England, Scotland, France and Ireland King, Defender of the Faith, &c. To all Christian People to whom these presents shall come, GREETING: WHEREAS our loving Subject William Courten Esq; deceased, and his Partners Anno 1643. by the depredation and hostile act of one Gailand, Commander in chief of two Ships belonging to the East-India Company of the Netherlands, was between Goa and Maccao in the Straights of Malacca, depreded and most injuriously spoiled of a certain Ship named the Bona Esperanza, and of her tackling, Apparel, and Furniture, and all the Goods and Lading in her, upon a very hopeful trading Voyage to China, which were carried to Batavia, and there all de facto without due Process of Law confiscated, And that also in the same year another laden Ship of our said Subject, called the Henry Bonadventure, being come on ground near the Island Mauritius, was there both Ship and Goods seized upon by some of the Officers and Ministers, and others under the command of the said East-India Company and utterly detained from the right Owners. AND WHEREAS the said William Courten, and his Assigns in his life time, used all possible endeavours to recover the said Ships and Goods, and to procure further Justice against the Malefactours, and yet could obtain no restitution or satisfaction, whereby they became to be much distressed and utterly undone in their Estate and Credit: And that thereupon, and upon the most humble supplication and Addresses of Francis Earl of Shrewsbury, and William Courten Esquire, Grand Child and Heir of the said Sir William deceased, Sir John Ayton

Ayton and Sir Edmond Turner Knights, George Carew & Charles Whitaker Esquires, on the behalfe of themselves and others interested in the said two Ships Bona Esperanza and Henry Bonadventure, and in the Estates of the said Sir William Courten deceased, Sir Edward Littleton Baronet, & Sir Paul Pindar Knight deceased, that We would take their Case into Our Princely consideration. WE OUT OF A JUST SENSE We then had and still have of their unjust SUFFERINGS in that business, both by Our own Letters under OUR SIGN Manual to the States General of the United Provinces, and by Sir George Downing Knight and Baronet, Our Envoy Extraordinary, to whom We gave Special Command so to do, required satisfaction to be made according to the Rules of Justice, and the amity and good correspondence, which We then desired to conferre with them firm and inbiviolable. AND WHEREAS after several Addresses made to the said States General by Our said Envoy, and nothing granted effectual for relief of Our said Subjects, (whom We take Our selves in Honour and Justice, concerned to be satisfied and repaid) We lately commanded the said Sir George Downing to intimate and signifie to the said States, that We expected their final Answer, concerning satisfaction to be made for the said Ships and Goods by a time then prefixed and since elapsed, that We might so govern Our selves thereupon, that Our aforesaid Subjects might be relieved according to Right and Justice; And yet no satisfactory Answer hath ben given, so that We cannot but apprehend it to be, not only a fruitless endeavour, but a prostituting of Our Honour and Dignity, to make further Application, after so many denials and slights. AND WHEREAS John Exton, Doctor of Laws, Judge of Our High Admiralty Court of England, upon Our Command, to certifie to Us the value of the losses and damages sustained by the said William Courten and Partners, whose Interest is now vested in our loving Subjects, Sir Edmond Turner Knight, and George Carew Esquire and Partners, hath upon full Examination and proofs thereof made by twineses in Our High Court of Admiralty, reported and certified under his hand, that the same do amount to the summe of One hundred fifty one thousand six hundred and twelve pounds.

C

NOW

Of Letters of Marque and Reprizal.

NOW KNOW YE, That for a full restitution to be made to them for their Ships, Goods and Merchandizes, of which the said William Courten, and the Assigns of the said William Courten and Partners, were so despoiled as aforesaid, with all such Costs and Charges, as they shall be at for the recovery of the same, We by the Advice of our Privy Council have thought fit, and by these presents do grant Licence and Authority under Our Great Seal of England, unto Our said Subjects Sir Edmond Turnor and George Carew, their Executors, Administrators and Assigns, for and on the behalf of themselves, and other Persons interested as aforesaid, to equip, victual, furnish, and to set to Sea from time to time, such and so many Ships and Pinaces as they shall think fit. PROVIDED always that there be an Entry made and recorded in the Admiralty Court of the Names of all Ships and Vessels, and of their Burden and Ammunition, and for how long time they are victualled; And also of the Name of the Commander thereof, before the same or any of them be set forth to Sea; And with the said Ships and Pinaces by force of Arms to set upon, take and apprehend any of the Ships, Goods, Monies and Merchandizes of the States General or any of the Subjects inhabiting within any their Dominions or Territories, wheresoever the same shall be found, and not in any Port or Harbour in England or Ireland, unless it be the Ships & Goods of the Parties that did the wrong. And the said Ships, Goods, Monies and Merchandizes, being so taken and brought into some Port of Our Realm and Dominions, an inventory thereof shall be taken by Authority of Our Court of Admiralty, and Judgment shall be given in Our Court of Admiralty by the Judge or Judges thereof, for the time being, upon proofs made before him or them, that the said Ships, Goods, Wares, Merchandizes or Money, did belong to the States-General, or any of the Subjects as aforesaid. That they shall be lawful prize to the said Sir Edmond Turnor and George Carew, their Executors, Administrators and Assigns as aforesaid, to retain and keep in their or any of their Possessions, and to make Sale, and dispose thereof in open Market or howsoever else, to their and every of their best Advantage and Benefit, in as ample manner

as any time heretofore hath been accustomed by way of
 Reprezal, and to have and enjoy the same as lawfull
 prize, and as their own proper Goods: "SO THAT
 "NEITHER Captain, Master nor any of the Com-
 "pany, that shall serve in his own Person, or shall pro-
 "mote and advance the said enterprize in manner and
 "form aforesaid, shall in any manner of wise be reputed
 "or challenged for any Offender against any of Our
 "Laws. And that also it shall be lawfull for all manner
 "of persons as well our Subjects, as any other to buy
 "the said Ships, Goods and Merchandizes so taken and
 "apprehended by the said Captains, Masters and others,
 "and adjudged as aforesaid, without any damage, loss,
 "hinderance, trouble, or molestation or incumbrance,
 "to besale the said Buyers, or any of them, in as ample
 "and lawfull manner, as if the Ships, Goods, Wares
 "and Merchandize, had been come and gotten by the
 "lawfull Traffick of Merchants, or of just prizes in the
 "time of open War. PROVIDED always, that all
 Ships, Goods, and Merchandize, taken by virtue of this
 Our Commission shall be kept in safety, and no part of
 them wasted, spoiled, or diminished, or the Bulk thereof
 broken, until Judgment have first past as aforesaid, that
 they are the Ships and Merchandizes of the States Ge-
 neral, or some of their Subjects as aforesaid. And if
 by colour of this our Commission, there shall be taken
 any Ships, Goods, or Merchandizes of any of Our loy-
 al Subjects, or the Subjects of any Prince, or State
 in good League, or Amity with Us (except the States
 General) or their Subjects as aforesaid, and the Goods
 therein laden, sold and imbezelled or diminished, or the
 bulk thereof broken in any Place before they shall be ad-
 judged to belong to the States General, or some of their
 Subjects as aforesaid, that then this Commission shall
 be of no sufficient Authority to take the said Ships,
 Goods and Merchandizes, or to warrant, or save harm-
 less such as shall receive, buy or intermeddle therein, &
 but that both the prizes so taken, and the said Ship of
 War, shall be confiscated to our use. "AND FUR-
 "THER, We do hereby declare that it is our will and
 "pleasure, that this Our Commission shall remain in
 "full force and power, to all intents and purposes, until
 C 2 "the

Of Letters of Marque and Reprizal.

"the said Sir Edmond Turnor, and George Carew, their
 "Executors, Administrators and Assigns, as aforesaid,
 "shall by virtue thereof have by force of Arms appre-
 "hended, taken, seized, recovered, and received from the
 "said States General, or their Subjects, One hundred
 "fifty one thousand six hundred and twelve pounds, ac-
 "cording to the appraisement to be made by sufficient
 "Appraisers upon Oath nominated and authorized in
 "Our said Court of Admiralty, of all such Ships, Goods,
 "Wares, and Merchandizes, as shall be taken from the
 "said States General, or any of their Subjects, by virtue
 "of this Commission, or shall otherways receive satis-
 "faction of the Debt aforesaid, by Composition to be made
 "between those of the East India Company of the Ne-
 "therlands, and the said Sir Edmond Turnor, and George
 "Carew, their Executors, Administrators and Assigns
 "as aforesaid. NOTWITHSTANDING it so happen,
 "the present difference between Us, and the States
 "General depending upon general Reprizals, may be
 "agreed and composed, and that in the interim a Peace
 "and good Correspondence may be renewed between Us
 "and the said States General: In which case nevertheless,
 "it is Our will and pleasure that in the Execution of
 "this Our Commission no violence shall be done to the
 "Persons of the said Subjects of the said States General,
 "but only in case of resistance, and that after in cold
 "blood, the Subjects of the said States General, if hurt
 "or wounded, shall be used with all convenient office of
 "humanity and kindness. AND FURTHER Our will
 "and pleasure is, that although it shall happen that all
 "hostility between Us, and the States General and Our
 "respective Subjects shall cease, yet this Our Commission
 "shall remain. and be in full force and power, to the said
 "Sir Edmond Turnor and George Carew, their Execu-
 "tors, Administrators and Assigns, as aforesaid, by vir-
 "tue thereof to apprehend, take, and seize by force and
 "Arms, so many more of the said Ships and Goods of
 "the States General, or any of their said Subjects, as
 "besides the said summe before mentioned shall counter-
 "bail, satisfie, and pay all such Costs and Charges as
 "the said Sir Edmond Turnor and George Carew, their
 "Executors, Administrators, or Assigns as aforesaid,

"shall

"shall from time to time make proof to have disbursed
 "and paid towards the equipping, manning, paying,
 "furnishing, and victualling of the said Ships, so licensed
 "and Authorized as aforesaid, by this Our said Commis-
 "sion to be equipped, manned, furnished, and victualled by
 "the said Sir Edmond Turnor and George Carew, their
 "Executors, Administrators and Assigns, as aforesaid, for
 "the purpose aforesaid. AND OUR WILL and pleasure
 is, and We do hereby require Our Judge or Judges
 of Our High Court of Admiralty, for the time being,
 and all other Officers of the Admiralty, and all other
 Our Judge or Judges, Officers, Ministers, and Sub-
 jects whatsoever to be aiding and assisting to the said Sir
 Edmond Turnor, and George Carew, their Executors,
 Administrators, and Assigns as aforesaid, in all points
 in the due Execution of this Our Royal Commission, and
 to proceed to adjudications, and adjudge all Ships, Mer-
 chandizes, Monies, and Goods by virtue thereof to be ta-
 ken according to Our Princely intention, hereby signi-
 fied and expressed, and to take care that this Our Royal
 Commission be duly executed, and favourably interpreted
 and construed in all respects, to the benefit and best ad-
 vantage of the said Sir Edmond Turnor and George Ca-
 rew, their Executors Administrators and Assigns, as
 aforesaid. IN WITNESS whereof, We have caused
 these Our Letters to be made Patents. Witness Our
 self at Westminster, the 19. day of May, in the seven-
 teenth Year of Our Reign.

BY THE KING.

XVI. It is not the place of any man's *Nativity*, but his
Domicil; not of his *Origination*, but of his *Habitation*,
 that subjects him to *Reprize*: The Law doth not consider
 so much where he was born, as where he lives; not so
 much where he came into the World, as where he im-
 proves the World.

If therefore Letters of Reprizal should be awarded
 against the Subjects of the *Duke of Florence*, and a Native
 of *Florence*, (but Denized or Naturalized in *England*)
 should have a Ship on a Voyage for *Leghorn*, if a Caption
 should be made, the same is not lawful, nor can the same
 be made prize.

C 3

XVII. Nor

Of Letters of Marque and Reprizal.

XVII. Nor doth it any where appear, that *Reprizal* can be granted on misfortunes happening to Persons or their Goods, residing or being in Foreign parts in time of War there; for if any misfortune happens, or is occasioned to their effects, or to their persons, then they must be contented to sit down under the loss; it being their own fault, they would not fly or relinquish the place, when they foresaw the Country was subject to the spoil of the Souldiers, and devastation of the Conqueror.

The Factions of the *Guelfs* and *Gibellins* in Florence, warring against each other. The *Guelfs* obtaining the Victory, and thrusting the *Gibellins* out of it, after they had taken the City, *Dom. cujusdam Hugonis de Papi in hoc Regno Angliæ demorantis diruerunt*, and plundered his Goods therein, *qui Hugo supplicavit Domino Regi, ut inde Itali Mercatores* (of that Faction and City then in England) *emendas hic sibi facerent*; upon which *adjudicatum fuit, quod dicti Mercatores dicto Hugoni satisfaciant pro damnis susceptis, & destructione domus suæ*: upon which a Writ of Error was brought, and the Judgment was reversed, in these words; *Quod non est consuetudo Angliæ de aliqua transgressione facta in aliena Regione, tempore Guerra, vel alio modo — consideratum est, quod totus processus & ejus effectus provocentur, &c.*

XVIII. By right (for so it is now called of rendring like for like) there are many persons exempted, and those whose persons are so privileged, have also protection for their Goods, some by the *Laws of Nations*, some by the *Civil Law*, others by the *Common Law*; among which *Ambassadors* by the Laws of Nations, their Retinue and Goods are exempt, coming from him who awarded the Reprize, the *Laws of Nations* not only providing for the Dignity of him that sends, but likewise the secure going and coming of him that is sent.

Nor against those that travel for Religion, nor on Students, Scholars, or their Books; nor on Women or Children by the *Civil Law*: nor those that travel through a Country, staying but a little while there; for they are only subject to the Law of the place.

By the *Canon Law* Ecclesiastical persons are expressly exempt from Reprizals.

A Merchant of another place than that against which

Repri-

Mich. 5 E. 1.
Rot. 53. (in The-
saur. Recept.
Regis in Scac)
coram Rege Flo-
rentiæ.

Vide Rot. Vascor-
niæ 28 E. 3.
Rot. 7. pro Rob.
Draper & aliis
Civibus Corke
in Hibernia.

Rex facie tu
Regium Nun-
tium Populi Ro-
mani Quirit.
vasa comitesq;
meos. Th: Am-
bassador of the
Romans being
ill used by the
Carthaginians,
and Scipio's Ar-
my having tur-
prized th: Am-
bassadors of the
Carthaginians,
was deminded
what should be
done to them,
answer'd, not as
the Carthagini-
ans have done
to the Romans.

Reprizals are granted, albeit the Factor of such Goods were of that place, are not subject to Reprizals.

XIX. Ships driven into Port by storm or stress of weather, have an exemption from the Law of Reprizals, according to the *Jus commune*, but by the Law of England otherwise, unless expressly provided for in the Writ, or Commission.

But if such Ship flies from his own Countrey to avoid Confiscation, or some other fault, and is driven in by stress of weather, she may then become subject to be prize.

But it is not lawful to make seizure in any Ports, but in his who awarded the Reprizal, or his against whom the same issued; for the Ports of other Princes or States the Peace of them are to be maintained.

XX. Ships attacked by those that have Letters of Reprize, and refused to be yielded up, may be assaulted and entred; and though it may fall out, not by intention, but by accident, that some of those that so resist, may happen to be slain, yet the fault will lye at their own doors, for hindring the execution of right, and that which the Law most justly approves of.

*Vita autem subditorum innocentium, ut ex tali causa obligetur, forte creditum fuit apud aliquos populos, eo nimirum quod crederent uni-
quisq; hominum vitam plenum esse in se, & ad Rem publicam potuisse transferri, quod minime esset probabile, nec sanctiori Theologia consentaneum. Grotius de Jure belli lib. 3. c. 2. §. 4.*
And seems to be of opinion by the Law of Charity, that the prosecution of right for a mans Goods, which inevitably must be by the life of man, ought to be omitted. *Lib. 2, cap. 10. Liv. lib. 2.*

XXI. This right of changing of *Dominion* is so odious, that in the taking of Goods, if by any possibility the right Owners may have restitution, the same hath been done; and though a larger time then 24 hours may happen between the capture and recapture, and so may *pernoctare* with the Captor; yet restitution may be made.

And therefore if he, who hath Letters of *Marque* or *Reprizal*, takes the Ships and Goods of that Nation, against whom the same are awarded, and brings the same into a *Neuter-Nation*, the Owners may there seize her, or there the *Admiral* may make restitution by Law, as well of the Ship's Goods to the Owners, as the persons captives to their former liberty; for that the same ought first to have been brought *infra Præsidia* of that Prince or State, by whose Subjects the same was taken:

And with this agrees the *Common Law*; for a *Dunkirker* having taken a *French Vessel*, sold the same at *Weymouth*,

Barthol. in Leg. si quid Bello D. de cap. Ang. & Salic. in Leg. ab hostibus, C. de Capt. Const. Gall. 20. tit. 13. Art. 24. Consul. Mar. 287.

Trin. 17 Car. I.
in B.R. Marthe's
Reports, Res
que infra Prasi-
dia perduca-
nondum sunt,
quoniam ab
hostibus occupa-
ta, Dominum
non mutant,
ex Gentium
jure.

whither it had been driven before it was brought *infra Præsidia Dom. Regis Hisp.* it was in such case ruled, that if a Ship be taken by Piracy, or Letters of *Marque* and *Reprizal*, and is not brought *infra Præsidia* of that Prince or State, by whose Subject the same was taken, the same could not become lawful prize, nor were the Owners by such a caption divested of their property.

But if the Caption be by Ships of War, the property will be immediately in the Captors, and never divested, unless afterwards *vi, manu & forti* be in Battle regained.

XXII. Upon the sharing the *Spoil* of the captivated Ships, regard is had to the Ships present, not the Captors only; (for his reward must be the encouragement of his Prince, like the *Roman Coronas*, of which there were various, according to the achievement of the Conqueror, in imitation of which our *Sovereign* in his Royal encouraging *Medals*, follows the example, to his deserving Commanders, as so many Ensigns to inflame Noble Souls to the performing Acts of Glory and Renown) for the profits of Prizes are to be equally divided amongst the Ships present, and not solely to the Captor; therefore if Letters of Reprizal are granted to two Ships, & they happen both of them at Sea to meet a Prize, and the one attacks and enters her, by means of which she becomes *absolutely* the Conquerors; yet the other hath right to an equal distribution with the Captor both in Ship and Goods, although he did nothing in the Conquest: the reason is, *That although he mist the opportunity of taking of her, yet the presence of his Vessel armed and prepared for Battle, at the time of taking, became a terror to the Ship that was so conquered*: And by the Law presumed *sine ejus*, that the other Ship would not or could be so taken, which Law hath passed the current, and approbation of the *Common Law*, as reasonable, just and equitable, and may be pretended or surmised to entitle the party Captor to the making restitution of a moiety to his Companion then present.

XXIII. But if it should happen, that those to whom Letters of *Marque* are granted, should instead of taking the Ships & Goods of that Nation against whom the same were awarded, wilfully take or spoil the Goods of another Nation in amity, this would amount to a downright Piracy. And the persons offenders should for such fault

Mich. 22 Eliz.
Somers and Sir
Rich. Bulkley's
C. Leonrd 2.
part 181.

Trin. 2 Jac. in
B. R. Rolls,
Abridg. fol. 530.

fault create a Forfeiture of their Vessel, and the Owners must be for ever concluded by the same, notwithstanding such *Commission*.

Sir Fran. Mow's
Rep. 1 Jac.
Waltham vers.
Mulgar.

XXIV. But that must be understood where such a Caption is done in a Piratical manner; for most certainly, if Letters of Reprizal are granted to a man, and then he devolves the power to another, and the party to whom the power is assigned, takes the Ship and Goods of another Nation than against whom the same were awarded, but upon a violent presumption that he made a right Caption, for that he found the Colours of several Nations in the Ship, the Mariners of several Countries, the Ship of the built of that Country against whom the Letters of Reprizal were awarded, though perhaps upon a Judicial hearing the parties are restored to their Ship and Goods, yet the Captors are not to be punished *Criminaliter*, nor the Grantee of the Letters Patents *Civiliter*: and the reason wherefore it was no injury in the Captors to take, did arise from the probable cause which will excuse the Captors from punishment; (though perhaps it will not from answering of the damage) but it is clear, the Grantees are excused from both, unless privy to the Caption; and the reason is this, for the Letters Patents do not only vest the debt in the party, but do likewise give power to the party to recover, and is a Judicial process to obtain satisfaction *vi, manu & forti* from the Subjects of that Prince or State against whom the same are awarded: So then it will be no more than if the Creditor delivers process to the Officer to take his Debtor, and he takes a wrong person without the knowledge of the Creditor, this may subject the Officer to answer damage to the party taken, but not the Creditor.

Stat. 4 H. 5. c. 7.
14 H. 4. c. 4.

XXV. Therefore Letters of *Marque* or *Reprisal* issue not without good and sufficient Caution first given for the due observance thereof, according to Law; the transgression of which creates a Forfeiture of the same.

And therefore having taken a Prize, and brought the same *intra Praesidia*, the Captor must exhibit all the Ship-papers and captived Mariners to be examined in order to adjudication, till when Bulk ought not to be broken without *Commission*, nor may the Captain of the Captor suffer an imbezlement of the lading, or sell, barter, or dispose of any part without *Commission*; for the King hath a proportion in all Prizes.

3 Eliz. cap. 5.

Such

12 Car. II. cal-
led the act of
Navigation.

Greg. lib. 9.

Fitz. H. N. B. fol.
162. Old. N. Bre.
103. Reg. Orig.
fol. 176.

* Seneca Benef.
cap. 19.

Pat. 26 E. 3.
pars 1. M. 16.
Dorso.

Pat. de An. 6 H.
5. pars 1. M. 9.
Dorso. De cate-
ris personis ar-
rest. & capiend.

Such Goods so brought in are not subject to pay Customs.

XXVI. By the Law of Nations, *ipso facto*, the Domi-
nion of the things taken by those to whom Letters of
Marque are granted, become the Captors, till the debt
and costs, that is, the original damage and subsequent
charges are satisfied, which being done, the residue ought
to be restored: So the *Venetians* used their equity, having
taken the Ships of *Genoa*, did not spoil any of the lading,
but preserved the same very carefully, till the debt was
paid; which done, restitution was made of the things
entirely, without diminution.

XXVII. When for the fault perhaps of a few, a debt
becomes *National*, by reason of which the Goods of the
Innocent become liable (if taken for satisfaction) whether
by the Law of *England*, the party ought to have Contri-
bution, is a question most certain by the *Common Law*;
where more are bound to one thing, and yet one is put to
the whole burden, the party may have process called *Con-
tributionis faciende* for his relief: but when a debt becomes
universal or *National*, it seems otherwise: For if one lends
my Country money, I will not call my self debtor, yet I will pay
my share *: so it may seem equitable by the Laws of Cha-
rity, though not compellable by the Laws of the Land.

XXVIII. Yet when depredations have happened to Fo-
reign Merchants, and complaint hath been made, the
Kings of *England* have often issued forth Commissions to
inquire of the same: and so it was done upon the Petition
of some Merchants of *Genoa*, who complained against the
Inhabitants of the Isle of *Garnsey* for a depredation, in
taking away and detaining their Merchandize and Goods,
to the value of many thousands of pounds, out of a Ship
wracked by tempest near that Isle, by which the Commis-
sioners were impower'd to punish the offenders, and to make
restitution and satisfaction for the damages.

The like complaint was made by the Merchants of the
Duke of *Britain*, of certain depredations committed by the
Subjects of the King of *England*, who issued forth the like
Commission, and to give them reparation and damages for
the same; so that if the Subjects of the King of *England*
have had their Goods taken by way of Reprize for the sa-
tisfaction of such debt or damage, they may have the bene-
fit of the like Commissions to lick themselves whole out of
the estates of the offenders.

CHAP.

C H A P. III.

Of Privateers or Capers.

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| <p>I. Of Privateers, whether allowable by the Laws of Nature.</p> <p>II. Of permission of such by the Laws of Nations.</p> <p>III. The occasion of their first Institution.</p> <p>IV. Whether it be lawful to undertake such an Employment.</p> <p>V. Of Commissions general to endamage an Enemy.</p> <p>VI. Of Commissions special and to Privateers, and the immunities they claim by the same.</p> <p>VII. Of the care that is obliging on the issuing forth such Commissions.</p> <p>VIII. Of provisions made as in reference to their regulating, and especially in the last Treaty Marine between England and Holland.</p> | <p>IX. Of Goods subject to Prize, how considered in reference to adjudication general.</p> <p>X. Of the Goods considered in reference to adjudication, on occasions special.</p> <p>XI. Of the Lading made Prize, whether it draws in a Forfeiture of the Vessel, and where otherwise.</p> <p>XII. Whether Ships refusing to yield up to such, life is engaged.</p> <p>XIII. Privateers where subject to punishment, and their actions where occasion a Forfeiture of their Vessel.</p> <p>XIV. Of things not subject to spoil.</p> <p>XV. Considerations general on Privateers.</p> |
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Naturally every one may vindicate his own right, therefore were our hands given us; but to profit another in what we can, is not only lawful, but commendable; since nothing is more serviceable to man than man. Now there are divers obligations between men which engage them to mutual aid; for Kinsmen assemble and bring help, and Neighbours are called upon, and fellow Citizens; for it behoves every one either to take Arms for himself, if he hath received injury, or for his Kindred, or for his Benefactors, or to help his Fellows, if they be wronged. And Salom taught, *That Common-wealths would be happy, wherein every one would think anothers injuries to be his own.* But when War is denounc't, it matters not what obligations are wanting, it is enough the Nation is injured in general; for in that every individual is wronged, and all participate in the indignities and publick damages of his Country; to revenge or prevent which, is the duty of every member of the same.

Leg. servm. D. de Serv. export. DD. ad Leg. si quis in servitutum. De fur. Leg. prohib. c. de Jur. Fisci.

Barthol. in Leg. ut vim. D. de just. & Jure n. 7. & 8.

II. Since

Cicero Offic. 3.

The Son of *Cato* *Censorius* having served as a private Soldier of pay under *Pompilius*, the Legion being disbanded, the young man was resolved to remain with the Army, though but a Volunteer; *Cato* wrote to *Pompilius* the General, that he should give him an Oath the second time, giving this reason, *Quia priore amisso, jure cum hostibus pugnare non poterat*: *Cicero* sets down the very words of *Cato* to his Son, whereby he admonisheth him not to enter into Battle; *Neque enim jus esse qui miles non sit pugnare cum hoste*. Cic. Offic. 1.

II. Since therefore it is not against the *Law of Nature to Spoil him whom it is lawful to kill*, no wonder that the Laws of Nations permitted the Goods and Ships of Enemies to be spoiled, when it suffered their persons to be slain.

III. The approbation of which in the Wars of later Ages, hath given occasion to Princes to issue forth Commissions to endamage the Enemy in their Commerce, and to prevent such Supplies as might strengthen or lengthen out War, to persons to whom the prize or caption become absolutely the Captors, and that to prevent the spare of Ships of force to be absent from their respective Squadrons or Fleets.

By those of *Holland* they were termed *Capers*, by the *Spaniard* they had their denomination from their respective parts, as *Offenders*, *Dunkirkers*, and the like, in *England* called *Privateers*; how far the actions of those, as in relation to the attacking and killing of the Enemy, or spoiling of their Ships and Goods are lawful, not being commanded nor hired thereto, may be a question.

IV. By the Laws of Nations (as hath been said) it is lawful for every Subject of that Nation in War to seize upon the Enemies Goods and Ships, as also to kill them; for they are after War denounc't by Law, lookt upon as of no account, and if respect be had to natural and internal right, it seems granted to every one in a just War to do those things, which he is confident within the just measure of warring, to be advantageous to the innocent party: but though there may be such authority given, yet what title can they claim or appropriate to themselves of the Ships or Goods of Enemies, (for surely there is nothing owing to such, nor are they lawfully called to the same) unless they can shrowd themselves under the protection of this, that what they do, is only to exact punishment from the Enemy by the common right of men.

V. Commissions to kill or spoil the Enemy are in two respects, either General or Special: General as in a tumult;

mult; among the Romans the Consul said, *Whofoever would have the Commonwealth safe, let him follow me*; and to all particular Subjects is sometimes granted a right of killing in self-defence, when it is publicly expedient, as on a sudden occasion, and the like.

VI. Special Commissions are such as are granted to those that take Pay, and are under Orders; the not obeying of which may be punished with death, though the act succeeds well. *Leg. Desertorem. D. de re milit.*

Others to repair a particular damage by way of Re-prize, the original damage being turned into a National debt, but that satisfied, the other determines, or else to those who receive no pay, but go to War at their own charge; and that which is more, administer at their own costs a part of the War, by providing Ships of Force, and all other Military provisions to endamage the Enemy or their Confederates, the which are termed *Privateers*, &c. as above, to whom instead of pay is granted leave to keep what they can take from the Enemy: and though such Licence is granted them, yet may they not convert of their own heads to their private use those Prizes, before the same have been by Law adjudged lawful to the Captors, and the Admiral had his share. *C. Quando liceat unicuique Leg. 1. & 2.*

VII. Nor may such Privateers attempt any thing against the Laws of Nations, as to assault or endamage an Enemy in the Port or Haven, under the protection of any Prince or Republick, be he Friend, Ally, or Neuter, for the peace of such places must be kept inviolably.

Sir Kenelm Digby having obtained a Commission against the French, who being in the *Streights*, was every where honoured as a Cavalier whom the King of Great Britain favoured; in his Voyage he took some Prizes, and coming to *Algier* redeemed several Captives, whom he took aboard, and placed in the several Vessels he had made prize of: the which he so effected, that in a short time he became *Illustrissimo* of six Ships of War; coming to *Cape Congare*, ten leagues from *Scandaroone*, and having sent a Boat to descry the road, word being brought that there were in the road two *Venetian* Galeasses, with two other Galeons, two *English* Ships, and several *French* Ships, Sir Kenelm being satisfied of the Prize, resolved to attaque them the next morning, although the Admiral of

Of Privateers or Capers.

This matter was highly debated at the Council-board on the complaint of *Landy* then Ambassador for that Republick at London, Anno 1629. Vide *Hist. Republic. Venet. fol. 170.*

of the *Venetians* had declared himself Protector of the *French*, and that he would destroy all the *English* Ships of War that he should meet, either in that *Republicks* or *Grand Signiors* Seas. Sir *Kenelme* notwithstanding resolved to engage them, and accordingly bore up to them, and the *Venetian* General weighed Anchor to meet him; Sir *Kenelme* before he fired, sent a *Satty* to inform the *Venetian* of his Quality, and of his Commission, being only to endeavour to make prize of the *French*, and giving him all the assurance possible of his friendship and respect to the Republick; but before the *Satty* was answered, the engagement was begun by the *English*, *French* and *Venetian*. This action of Sir *Kenelme Digby* was questioned by the *Turk*; for that Hostility had been committed by the *English* in the *Grand Signiors* road, and thereupon the *Bassa* of *Aleppo* and *Cady* of *Scandarone* made an *Avania* or *Embargo* on the *English* Merchants, till reparation was made, for the breaking the peace of the Port.

VIII. In the granting of such private Commissions there is always great care to be had and taken by caution, to preserve the Leagues of our Allies, Neuters and Friends, according to their various and several Treaties; and therefore at this day by the late Treaty between His Majesty and the *States of Holland* at *London*, before any *Privateer* or *Caper* can receive Commission, the Commander is obliged to enter before a competent Judge, good and sufficient security by able and responsible men, who have no part or interest in such Ship, in 1500 *l. Sterling*, or 15500 *Gilders*; and when they have above one hundred and fifty men, then in 3000 *l.* or 33000 *Gilders*, that they will give full satisfaction for any damage or injuries, which they shall commit in their courses at Sea, contrary to that Treaty, or any other Treaty made between His Majesty and that *State*, and upon pain of Revocation and annulity of their Commissions, and for answering of such damage or injuries, as they shall do, the Ship is made liable.

IX. If a Suit be commenced between the *Captor* of a Prize and the *Claimer*, and there is a Sentence or a Decree given for the party reclaiming; such Sentence or Decree (upon security given) shall be put in execution, notwithstanding the Appeal made by him that took the Prize, which shall not be observed in case the Sentence shall be given

Treaty Marine at Lond. Decem. 1. 1674. In the Commission must always be mentioned that they have given such security.

Art. 13.

given against the Claimers; if torture, cruelty, or barbarous usage happens after a caption to be done to the persons taken in the Prize, the same shall *ipso facto* discharge such a Prize, although she was lawful, and the Captains shall lose their Commissions, and both they and the offenders be subjected to punishment.

X. Such sort of instruments having made a Caption of Ships bound for an Enemy from Nations Neuter, or in amity with both the warring States; the lading, in order to be made Prize is reduced to these three several heads.

First, Those Goods that are fit to be used in War, under which are included Powder, Shot, Guns, Pikes, Swords, and all other instruments and provisions of Armature fit to be used in the Field or at Sea.

The second, are those things that may be used in time of War and out of War, as Money, Corn, Victuals, Ships, and the like.

And the last, are those Goods that are only fit for luxury and pleasure.

XI. The first are accounted Prize without Controversie; *He is to be accounted an Enemy that supplies an Enemy with things necessary for the War.*

The second is to be governed according to the state and condition of the War; for if a Prince cannot well defend himself, or endamage the Enemy, without intercepting of such things, necessity will then give a right to the condemnation. And so *Queen Elizabeth* did the *Hansatick* Fleet taken, laden with Corn for *Lisbon*, upon consideration of the state of the War, the same became prize.

These Articles for their excellency are fit to be a Standard to all the Nations of Europe. Art. 14.

In hostium esse partibus, qui ad bellum necessaria hosti administrat. Consulat. Maris editus est lingua Italica, in quem relata sunt constitutiones Imperatorum Græcia, &c. cujus libri tit. 276.

Camden Anno 1591. By the fourth Article at the Treaty at Lond. 1674. those Goods that may be used out of War as in War (ex-

cept Ships) may not upon any account be called prohibited, nor subject to a condemnation, except carried to places besieged, Art. 4. See *John Mewsius* his *Danish History* concerning the Prohibiting of Goods by those Northern States. *Vide postea*, the Grand Prize condemned by *Queen Elizabeth* in tit. Customs, and *vide tit.* Ships of War, S. 24.

The last become free, and (as we have before mentioned) according to that of *Seneca*; *I will not help him to Money to pay his Guards; but if he shall desire Marbles and Robes, such things hurt not others, only they minister to his luxury: Souldiers and Arms I will not supply him with; if he shall seek for Players and recreations to soften his fierceness, I will gladly offer to him: Ships of War I would not send him, but such as are for pleasure and ostentation of Princes sporting in the Sea, I will not deny.*

XII. If

And persons so attempting to relieve an Enemy, may in some cases be punished; but if the same be done by necessity of obedience, though the parties are much to be blamed, yet are they not to be punished; and so it was with those which relieved Sir John Old-Castle with provisions, who being taken, were discharged.

But if part be prohibited Goods, and the other part is not prohibited, but such as according to the necessity of the War shall be so deemed, the same may draw a consequential condemnation of Ships, as well as lading.

By the seventh Article in the Treaty at London, if the Skipper will deliver out the prohibited Goods, the Ship may proceed with the rest in their Voyage or course, as they please, and the Ship shall not be brought into Port.

If part of the lading is prohibited, and the other part is merely luxurious and for pleasure, only the Goods prohibited become prize, and the Ships and the remainder become free, and not subject to infection.

Nec rem est mortis alienæ, inquit Augustinus, qui sui possessioni murorum ambitum circumduxit: si aliquis ex ipsorum usu percussus intereat. Publ. Epist. 154.

XIII. If such Ships shall be attacked in order to an examination, and shall refuse, they may be assaulted, like a house supposed to have Thieves or Pirates in it, refuses to yield up their persons, may be broken up by the Officer, and the persons resisters may be slain.

Leg. 5. de Navicul. C. lib. 3. Trin. 3 Jac. in B.R. Rolls 5. p. Abridg. f. 530.

XIV. But if any of these Privateers wilfully commit any spoil, depredations, or any other injuries, either on the Ships of our Friends or Neuters, or on the Ships or Goods of our own Subjects, they will notwithstanding they are not in pay, be subjected in some cases to death and other punishments, according to the demerits of their crimes, and perhaps may subject their Vessel to Forfeiture.

Pompon Leg. cum loca D. de Religiosis.

And though by the Law of Nature the Goods of Enemies are to be spoiled as well as their persons slain, yet some Goods and things seem exempted, and ought not to be spoiled, and therefore it is not lawful to land on the Territories of our Enemies, to spoil places dedicated to God: though Pomponius observes, when places are taken by the Enemy, all things cease to be Sacred; the reason given is, because the things which are called Sacred, yet are they not indeed exempted from humane uses,

uses, but are publick. *The Townsmen, saith Tacitus, opening their gates, submitted themselves and all they had to the Romans, themselves were spared, the Town was fired. Pompey entred the Temple by the right of Victory, not as a suppliant, but as a Conquerour*: and though that priviledge may seem right by the Law of War to a Sovereign, or a General, that intends a Conquest, yet that power may not seem devolved to him, whose Commission is cautionally to endamage the Enemy only, as in reference to his commerce and provisions of enabling them to withstand the War: Certainly, that Conquest is poor, whose Trophies and Triumphs are made up with Roofs, Pillars, Posts, Pulpits, and Pews, and the spoil of Agriculture. Hence it is, that at this day the King of France in Germany and the Netherlands accepts of Contributions, by which the Cities and Churches are not only spared, but even the Countrymen plough and sow as quietly as if there were no Armies in their Territories at all.

Tacit. Annal.

13.

Wars and Victories for the most part consist in taking and overthrowing Cities, which work is not done without injury of the Gods, the walls of Cities and Temples of the Gods partake in the same ruine, the Citizens and

Priests equally slaughtered; nor is the rapine of sacred riches and prophane unlike: so many are the sacriledges of the Romans as their Trophies, so many are their Triumphs over Gods and Nations: and then goes further, *Tot manubiae quot manent adhuc simulachra captivorum deorum. Mox & bene, Quod si quid adversi Urbibus accidit, eadem clades Templorum quae & mœnium fuerant.*

Even upon the same reason, that the instruments Husbandmen are not to be taken for a pledge by the Civil nor Common Law. *Leg. exeunt. C. quæ res pign. Coke sup. Littleton 47.*

XV. Most certain, those sorts of Capers or Privateers, being Instruments found out but of later Ages, and it's well known by whom, it were well they were restrained by consent of all Princes; since all good men account them but one remove from Pirates, who without any respect to the cause, or having any injury done them, or so much as hired for the service, spoil Men and Goods, making even a trade and calling of it, amidst the calamities of a War, and driving a commerce and mart with the spoil, and that with as much peace and content, as if they had never heard of tears, blood, wounds or death, or any such thing: such to expose their lives against Ships of the like kind, were both honourable and just, or those that should aid the Enemy with Goods prohibited as afore, such prizes were possessions most noble; but the Goods, Ships and

D

lives

Of Privateers or Capers.

lives of the innocent peaceable Traders to be exposed to rapine and spoil, renders them worse than the *Roman* Lictors, by how much 'tis to kill without cause, Heads-men executing the guilty, they the guiltless.

It was a high necessity that enforced the *English* to commisionate such, the number of her then Enemies, covering the Sea, like the *Egyptian* Locusts; it were well they were rejected by consent, or if allowed of, not subject to Quarter, when taken by Ships of War: A trade that *St. Paul* never heard of, when he said, *Who goeth to war at his own charge?*

1 Cor. 9. 7.

C H A P. IV.

Of Piracy.

- I. *Pirates what.*
- II. *Of the duty incumbent on Princes and States as in reference to such, and whether liable for the damages they commit.*
- III. *Pirates where they hold a Society, how the same is esteemed in Law, and of Equality held by them.*
- IV. *Whether capable of the Solemnities of War, and Right of Legation.*
- V. *Whether capable of succour by the Laws of Nations.*
- VI. *Ships where liable for redemption of the Master, remaining pledge for Ship and Lading, and where not.*
- VII. *Oath given to pay a reward for redemption of a Ship from Pirates, whether the same ought to be performed.*
- VIII. *Foreigners spoiled by English Pirates, may pursue for Justice within the Statute of 28 H. 8.*
- IX. *So where the Subjects of any Foreign Nation committing the same, may be punished by the same Statute.*
- X. *Piracy committed by the Subjects of a Nation in Enmity with the*

Crown of England among English Pirates, cannot be punished by the Statute of 28 H. 8.

XI. *Committed on the British Seas punishable by the Crown of England, and none other.*

XII. *Where committed on the Ocean, whether they may be executed without tryal, by the Law of Nature.*

XIII. *The like where the Judge refuses to try them, or in case of emergency, whether Justice may be executed immediately.*

XIV. *Pirates attempting to rob, commit a murder, whether all principals, or only the slayer, and the rest Accessories.*

XV. *If the Subjects of one Foreign Nation rob another, and bring the Booty into England, whether the party injured may proceed Criminaliter for punishment, and Civiliter for restitution.*

XVI. *Pirates take men, and no part of the Lading, if Piracy.*

XVII. *Where a Master may commit Piracy of those things that are committed to his charge, and where not.*

XVIII.

XVIII. *Where Piracy may be, though there be nothing taken : and where Goods are taken out of a Ship, and no body in it.*

XIX. *The Captain and Crew of a Vessel having a Commission of Reprieve commit Piracy, whether those that employed them ought to answer the damage.*

XX. *Where Goods taken at Sea amount not to Piracy.*

XXI. *Goods taken and retaken by a Friend, whether the property of the Prize is altered.*

XXII. *Of Restitution of Goods taken by Piracy by the Laws of England.*

XXIII. *Of Restitution refused by the Laws of England.*

XXIV. *Of Piracy as in reference to matters Criminal, and how punishable at this day by the Laws of England.*

XXV. *The Statute of 28 H. 8. how it operates in cases of Piracy.*

XXVI. *Of Pardons in cases of Piracy, Forfeitures, Corruption of*

blood, and Clergy.

XXVII. *Whether a Depredation committed in a Port within this Realm, remains Robbery, at the Common Law, or Piracy by the Law Marine.*

XXVIII. *Whether Clergy is allowable for a Depredation in a Port, and if Pardons touching the same.*

XXIX. *Of the operation of the Attainder in cases of Piracy.*

XXX. *Of Goods taken at Sea and brought to Land, whether the party is punishable by our Law.*

XXXI. *If the Admiralty claims either an original, or a concurrent Jurisdiction, the Courts above will not intermeddle.*

XXXII. *Satisfaction of old, how made to persons spoiled at Sea.*

XXXIII. *Persons unjustly detained in custody upon suspicion of Piracy, the Courts above on a Habeas Corpus may, if there be just cause, either bail or discharge them.*

I. **A** Pirate is a Sea-Thief, or *Hostis humani generis*, who for to enrich himself, either by surprise or open force, sets upon Merchants and others trading by Sea, ever spoiling their Lading, if by any possibility they can get the mastery, sometimes bereaving them of their lives, and sinking of their Ships; the Actors wherein, Tully calls Enemies to all, with whom neither Faith nor Oath is to be kept.

II. By the Laws of Nature Princes and States are responsible for their neglect, if they do not provide Ships of War, and other remedies for the restraining of these sort of Robbers; but how far they are bound, either by the Civil Law or Common Law of this Kingdom, may be some question: for it is agreed they are not the cause of the unjust spoil that is committed by them, nor do they partake in any part of the plunder; but if a Prince or State should send forth Ships of War, or Commissions for re prise, and those instead of taking prizes from the Enemy, turn Pirates and spoil the Subjects of other Friends, there has been some doubt, whether they ought not to

If the offenders could be found, they ought to be yielded up to Justice; and if they have any Estate, the same ought to go towards the reparation of the damage.

Caution is commonly taken upon the giving forth of such Commissions to prevent the same, if possible. They are generally restrained by Proclamation when a War breaks forth, and commanded, that none presume to set forth without a Commission.

* *Constit. Gallie* tom. 3. tit. 3. *constitutione* Anni 1533. cap. 44. *Vide etiam tom. con-*

stit. 3. tit. 2. constit. Anni 1543. cap. 44. Vide 21. Article at the Treaty at Breda between England and Holland, and the 15. Article in the Marine Treaty at London 1674. † Trin. 7. Jac. in B.R. Rolls fol. 530. Vide Sir Francis Moores Reports, 1 Jac. Waltham versus Ma gar.

make satisfaction to the Parties injured, in case the offenders should prove unable: surely there is no more reason for this latter than the first; seeing Princes and States may give all their Subjects power to spoil the Enemy, nor is such a Permission any cause why damage was done to our Friends, when even *private* men, without any such permission, might send forth *Ships of War*; besides it is impossible that *Princes* or *States* should foresee, whether they would prove such or not; nor can it be avoided, but we must employ such, otherwise no *Army* or *Fleet* could be prepared; neither are Kings to be accused if their Souldiers or Mariners wrong their Confederates, contrary to their commands, though they are obliged to punish and yield up the offenders, and to see that legal reparation be made out of the Estate of the Pirates. If *Letters of Marque* or *Reprizal* be granted out to a Merchant, and he furnishes out a Ship with a Captain and Mariners, and they instead of taking the Goods or Ships of that Nation against whom their *Commission* is awarded, take the Ships and Goods of a Friend, this is *Piracy* *; and if the Ships arrive in *England*. or in any other of His Majesties Dominions, the same shall be seized, and the Owners for ever lose their Vessel †.

From hence it is, that Princes and States are very cautious upon this we call *Jure Belli privati*, how they engage themselves, or those who seek reparation for wrongs before received; for the Person *injured* governs not the action, but devolves the power to some other hired for that particular use, whose Law is no more than this, *There is most right where is most pay or prize*. Unhappy state of man, whose support and living is maintained only by exposing himself to death, a Calling that nothing can make honest, but the highest necessity or pious charity! And therefore those that issue forth such sort of *Commissions*, generally take Caution for their returning within a convenient time, and not to wander in that unhappy condition.

III. Though

III. Though Pirates are called Enemies, yet are they not properly so termed: *For he is an Enemy, says Cicero, Leg. Hostes de who hath a Commonwealth, a Court, a Treasury, Consent and verb. signif. Concord of Citizens, and some way, if occasion be, of Peace and League;* and therefore a Company of Pirates or Freebooters are not a Commonwealth, though perhaps they may keep a kind of equality among themselves, without which no Company is able to consist; and though it is seldom they are without fault, yet they hold society to maintain right, and they do right to others, if not in all things according to the *Law of Nature* (which among many people is in part obliterated) at least according to agreements made with many other Nations: or according to Custom: So the Greeks at what time it was accounted lawful to take spoil at Sea, abstained from slaughter, and depopulations, and from stealing Oxen that plowed, as the *Scholiast* upon *Thucydides* observes; and other Nations living also upon the spoil when they were come home from Sea, sent unto the Owners to redeem (if they pleased at an equal rate) what they were robbed of at Sea: and at this day, if a Ship hath the Emperour of *Barbary's* protection, the Pirates of that Nation (if they seize) will restore, and if there be no protection, yet if taken within sight of their Castles, the Prize is not absolute; but if resistance is made, and there be a Caption, she then becomes the Captors for ever, *as the price of blood.*

Leg. Hostes de Captivis.

IV. Again, Pirates that have reduced themselves into a Government or State, as those of *Algier, Sally, Tripoli, Tunis,* and the like, some do conceive ought not to obtain the Rights or Solemnities of War, as other Towns or places: for though they acknowledge the Supremacy of the * *Port*, yet all the power of it cannot impose on them more than their own Wills voluntary consent to. The famous *Carthage* having yielded to the Victorious *Scipio*, did in some respect continue, and began to raise up her drooping Towers, till the knowing *Cato* gave Counsel for the total extirpation; out of the Ruines of which arose *Tunis*, the revenging Ghost of that famous City, who now, what open Hostility denied, by Thieving and Piracy continue; as stinking Elders spring from those places where noble Oaks have been felled; and in their Art are become such Masters, and to that degree, as to disturb the mightiest

* *Constantinople generally so called.*

Fuller's Holy
War lib. 4.
cap. 27.

Octobr. 5. Anno
1662. But by
the Turk in
these words,
Confirmed and
Sealed in the
presence of
Almighty God,
in our House in
the noble City
of Tunis, the
last day of the
Moon Delcadi
and the year
of Hegira 1085.
* Mar. 5. 1675
and (after-
wards, May 1. 1676. by the Turks.) being the 26. day of the Moon Zaphire, and
the year of the Hegira 1087.

Nations on the Western Empire; and though the same is small in bigness, yet it is great in mischief: the consideration of which put fire into the breast of the aged Lewis IX. to burn up this nest of Wasps, who having equipt out a Fleet in his way for Palestine, resolved to besiege it: whereupon a Council of War being called, the question was, Whether the same should be summoned, and carried, it should not; for it was not fit the solemn Ceremonies of War should be lavished away on a company of Thieves and Pirates. Notwithstanding this, Tunis and Tripoli and their Sister Algier do at this day (though nests of Pirates) obtain the right of Legation, and Sir John Lawson did conclude a Peace between his now Majesty by the Name of the most Serene and Mighty Prince Charles the Second, by the Grace of God King of Great Britain, France, and Ireland, Defender of the Faith, &c. and the most Excellent Signors Dabomet Bashaw, the Diban of the Noble City of Tunis, Haggie Mustapha Def. Porat Wei, and the rest of the Souldiers in the Kingdom of Tunis; and with them of Tripoli by Sir John Narborough * by the Name of Hali Bashaw, Ibrahim Dep, Aga. Diban, and Governours of the Noble City and Kingdom of Tripoli in Barbary. So that now (though indeed Pirates) yet having acquired the reputation of a Government, they cannot properly be esteemed Pirates but Enemies.

Tacit. Annal. 3.
Caesar lib. 3. de
Bello Civ.

Hist. Republ.
Venet. fol 91.

V. Pirates and Robbers that make not a Society, i. e. such a Society as the Law of Nations accounts lawful, are not to have any succour by the Law of Nations. Tiborius, when Tacfarinas had sent Legates to him, he was displeased that both a Traitor and a Pirate should use the manner of an Enemy, as Tacitus hath it; yet sometimes such men (Faith being given them) obtain the right of Legation as the Fugitives in the Pyrenean Forest, and the Banditi at Naples; and Solymán the Magnificent, having entertained Barbarossa the famous Pirate, sent word to the Venetians, that they should use him and esteem him no more as a Pirate, but one of their own Port.

VI. If a Ship is assaulted by a Pirate, for redemption of which the Master becomes a Slave to the Captors, by the

the Law Marine the Ship and Lading are tacitly obliged for his redemption by a general contribution. But if a Pirate shall feign himself stronded, and to decoy the Merchant Man for his relief, shall fire his Guns, or wave his Colours, who accordingly varies his course for his assistance, and the Pirate enters him, for redemption of which he becomes a Slave to the Pirate, there contribution shall not be made, because it was his folly to be so decoy'd.

*Leg. ad Legem
Rhod. de jactu.
l. 2. §. si navis
à Pir. tis re-
demptio.*

VII. By the *Civil Law* a Ransom promised to a Pirate, if not complied with, creates no wrong, and the reason given is, for that the Law of Arms is not communicated to such, neither are they capable of enjoying that privilege which lawful Enemies may challenge in the Caption of another: however this hath its measure; for a Pirate may have a lawful possession, the which he cannot be denied (if injury or wrong be done him) to claim the benefit of Law, but the reason of that springs from a more noble Fountain, which is his taking a legal course, for by that he hath submitted to the Magistrate, and paid obedience to the Laws in demanding Justice; besides, the same is not done so much in favour of the Pirate as in hatred of him who first commits the wrong. *Augustus* the Emperour having proclaimed a reward of ten Sesterces to be given him that should bring in *Coraxotus* the famous Spanish Pirate, who having notice of the same, voluntarily comes and presents himself before the Emperour, and demands the promised reward, and the question was, whether death or the Sesterces were to be his reward: The Emperour gave Judgment, that the sum promised should be paid him, for otherwise in taking away his life he should deceive him of the sum promised, which would, in effect, violate the publick Faith given to him, who of himself offered himself unto the tryal of Justice.

Edin. l. x. c. 1.

A Pirate attacks a Merchant Man, and enters her, for redemption of which the Master gives his Oath, at a time and place to pay the Pirate a sum certain; by some it hath been held, that the Master commits not perjury, if the price promised for redemption be not brought according to the Oath, because a Pirate is not a determinate, but a common Enemy of all, with whom neither Faith nor Oath is to be kept: but that is no reason

*Leg. lona fides.
D. Ex 106.*

for the assailing of the Vow: for though the person be deficient, yet the Just God is concerned; nor can that person that hath promised a thing, satisfie his Conscience after he hath once delivered it to him, to recover it back again; for the words in an Oath, as to God, are to be understood most simply, and with effect; and therefore he that returned secretly to the Enemy, and again departed, made not good his Oath concerning his return.

On a Commission grounded on the Stat. awarded. *Rott. Adm. 28 Eliz. m. 23.*

VIII. If an *English Man* commit Piracy, be it upon the Subject of any Prince or Republick in amity with the Crown of *England*, they are within the purview of the *Stat. of 28 H. 8.* and so it was held where one *Winterfon, Smith*, and others, had robbed a Ship of one *Maturine Gantier*, belonging to *Bourdeaux*, and bound from thence with *French Wines* for *England*, and that the same was Felony by the Law Marine, and the parties were convicted of the same.

Rot. Adm. anno 28 Eliz. m. 24.

Normandy was lost by King *John*, and out of the ligeance of the King of *England*, and they were as now accounted *Aliens. 42. Assise plac. 25. per Shard. Vid. 2 H. 5. cap. 6.*

IX. And so it is if the Subject of any other Nation or Kingdom, being in amity with the King of *England*, commit Piracy on the Ships or Goods of the *English*, the same is Felony, and punishable by virtue of the *Stat.* and so it was adjudged, where one *Careless*, Captain of a *French Man* of War of about 40 Tuns, and divers others. setting upon four Merchant Men going from the Port of *Bristol* to *Caermarthen*, did rob them of about 1000 *l.* for which he and the rest were arraigned, and found guilty of the Piracy

But before the *Stat. of 25 Ed. 3.* if the Subjects of a Foreign Nation and some *English* had joyned together, and had committed Piracy, it had been Treason in the *English*, and Felony in the Foreigners: And so it was said by *Shard*, where a *Norman* being Commander of a Ship, had, together with some *English*, committed robberies on the Sea, being taken, were arraigned and found guilty; the *Norman* of Felony, and the *English* of Treason, who accordingly were drawn and hang'd. But now at this day they both receive Judgment as Felons by the Laws Marine.

X. If the Subjects in enmity with the Crown of *England* be Sailors aboard an *English* Pirate with other *English*, and then a robbery is committed by them, and afterwards are taken, it is Felony without controversie in the *English*, but not in the *Strangers*; for they cannot be tryed by vir-

tue

the of the Commission upon the *Statute*, for it was no Piracy in them, but the depredation of an Enemy, for which they shall receive a tryal by *Partial Law*, and Judgment accordingly.

XI. Piracy committed by the Subjects of the *French* King, or of any other Prince or Republick, in amity with the Crown of *England* upon the *British* Seas, are punishable properly by the Crown of *England* only, for the Kings of the same have *istud regimen & dominium exclusivè* of the Kings of *France*, and all other Princes and States whatsoever.

XII. If Piracy be committed on the *Ocean*, and the Pirates in the attempt there happen to be overcome, the Captors are not obliged to bring them to any Port, but may expose them immediately to punishment, by hanging them up at the Main-yard end before a departure; for the old natural liberty remains in places where are no judgments.

And therefore at this day, if a Ship shall be on a Voyage to the *West-Indies*, or on a Discovery of those parts of the unknown World, and in her way be assaulted by a Pirate, but in the attempt overcomes the Pirate, by the Laws Marine the Vessel is become the Captors; and they may execute such *Beasts of prey* immediately, without any solemnity of condemnation. If we respect expletory Justice, it cannot be denied, but for the conservation of Ship and Goods, a Pirate invading may be slain, for the inequality between these things and life is made up in favour of the innocent, and by hatred to the injurious: whence it follows, if we regard only that right, that a Pirate running away with stoln Goods, if they cannot otherwise be recovered, may be sunk. *Demosthenes* said, *It is very hard*

XIII. So likewise, if a Ship shall be assaulted by Pirates, and in the attempt the Pirates shall be overcome, if the Captors bring them to the next Port, and the Judge openly rejects the Tryal, or the Captors cannot wait for the Judge without certain peril and loss, Justice may be done upon

Selden Mare
Claus. lib. 1.
cap. 27. Case of
Reginor Grim-
bald in tempor.
Ed. 1. Cited in
4. Instit. fol.
142. in c. of
the Admiralty.
Inicere manum
parce & traxerunt
debitum sibi, &
sermone usus est
juris; nam ma-
nus injectio di-
citur, quoties
nulla judicis au-
thoritate, rem
nobis debitam
vindicamus.
Serv. Æn. 11.

Oratione in A-
ristocratem.

Leg. extat. D.
quod metum.

Honorius & Theodosius: idcirco Judiciorum vigor Jurisque publici tutela in medio constituta, ne quisquam sibi ipsi permittere valeat ultionem. Leg. nulli C. de Judais.

Caius Caesar being but a private man pursued the Pirates, by whom he formerly had been taken, and spoiled by them, and making up to them with such a Fleet as he possibly in haste could get ready, attacked, burnt, and destroyed their Ships, and the men he brought back to an Anchor, where repairing to the *Proconsul* to do Justice, and he neglecting, himself returned back, and there hang'd them up.

Plutarch, in Caesar.

XIV. If a Pirate at Sea assault a Ship, but by force is prevented entering her, and in the attempt the Pirate happens to slay a person in the other Ship, they are all *Principals* in such a murder, if the *Common Law* hath jurisdiction of the cause: but by the *Law Marine*, if the parties are known, they who gave the wound only shall be *principals*, and the rest *accessories* *; and where they have cognizance of the principal, the Courts at *Common Law* will send them their accessory, if he comes before them †.

* *Ralph Williams* indicted for the murder of one *John Terrey*; and *Bridges, Black*, and others as Accessories, *Rott. Admir. 28 Eliz. M. 24.*

† *Telverton* fol. 134. 135.

*Res que intra Præsidia perduntur non sunt, quanquam ab hostibus occupata, dominum non mutant ex Gentium jure. Grotius de Jure Belli ac Pacis, cap. 9. §. 16. * Trin. 17 Car. in B.R. Marth's Reports. † Leg. Hostes & Leg. Latrones D. de Cap. Leg. postlim. à Piratis eod. Tit.*

XV. If a *Spaniard* robs a *French-Man* on the High Sea, both their Princes being then in amity, and they likewise with the King of *England*, and the Ship is brought into the Ports of the King of *England*, the *French-Man* may proceed *Criminaliter* against the *Spaniard* to punish him, and *Civiliter* to have Restitution of his Vessel: but if the Vessel is carried *intra Præsidia* * of that Prince, by whose Subject the same was taken, there can be no proceeding *Civiliter*, and doubted if *Criminaliter*; but the *French-Man* † must resort into the Captors or Pirates own Country, or where he carried the Ships, and there proceed.

The Caption was in 1665. Adjudication passed May 13.

1670. upon which there was an Appeal to the Duke of *York*; but nothing came of it. *Rott. Admir. in An. supradict.*

A *Dutch-Man*, but Naturalized by the Duke of *Savoy*, and living at *Villa Franca* in his Dominions, procures a *Commission* from the States of *Holland*, and coming to *Le-*

ghorn, there rid with the Colours and Ensigns of the Duke of Savoy; the Ship *Diamond* being then in Port, and having received her lading, was afterwards in her Voyage home surpris'd by that Caper, and brought into *Villa Franca*, and there condemned and sold to one *Poleman*; which Ship afterwards coming for *England*, the Plaintiffs having notice, made a seizure, and upon Tryal Adjudication pass'd for the Plaintiffs, the original Proprietors: For though the Ship of War and the Captors were of *Savoy*, and carried thither; yet being taken by virtue of a *Dutch Commission*, by the *Law Marine*, she must be carried *infra Præsida* of that Prince or State by virtue of whose *Commission* she was taken. Nor can such carrying of the Ensigns or Colours of the *Duke of Savoy*, who was then in amity with the Crown of *England*, or the *Commander*, though a Subject of that Prince, make him a Pirate, or subject them or those to whom they have transferred their interest of the Prize, any ways to be questioned for the same *Criminaliter*; for that the original *quoad* as to the taking was lawful, * *as one Enemy might take from another*; but *Civiliter* the same might be, for that the Captor had not entitled himself to a firm possession †. And therefore in all cases where a Ship is taken by *Letters of Marque or Piracy* *, if the same is not carried *infra Præsida* of that Prince or State by whose Subject the same was taken, the Owners are not divested of their property, but may re-seize wheresoever they meet with their Vessels.

XVI. If a Pirate attacks a Ship, and only takes away some of the Men, in order to the selling them for slaves, this is Piracy by the *Law Marine*; but if a man takes away a *Villain* or *Ward*, or any other Subject, and sells them for slaves, yet this is no robbery by the *Common Law*.

Cumberland, Northumberland, and Westmorland was Felony 43

XVII If a Bale or Pack of Merchandise be delivered to a Master to carry over Sea to such a Port, and he goes away with the whole Pack or Bale to another Port, and there sells and disposes of the same, * the same is no Felony. But if he opens the Bale or Pack, and take any thing out, *animo furandi*, the same may amount to such a Larceny, as he may be indicted in the *Admiralty*, though it amounts

not

* *Bulstred*. 3. part. fol. 28.
Case of *Samuel Pellagry*.
† *Grotius de jure belli ac pacis*, lib. 3. cap. 9.
§. 15. & 16.
* *Mich.* 8 *Jac.* in *B.R.* *Brownlow* 2. part. *Westons C.*

Co. 3. *Inst.* 109. lib. 8. fol. 32. 6.
Caley's C. but *Black Mail* and such sorts of taking in *Eliz.* cap. 13.

* *ff. Nautæ Camp.* l. 1. *sect.* 3. *Stab. Glauvil.* lib. 10. cap. 13.

13 Ed. 4. 9.
Nauta Caup.
Stab. lib. sect. 7.
sect. recepit.

Co. 3. Inst. 107,
108.

44 E. 3. 14.
4 H. 4. 2.
§. ad Leg. Rhod.
de jact. l. 2. §.
si navis à Pi-
ratis redempta
sit.

14 E. 3. Cor.
115.

Trin. 7 Jac. in
B. R. Rolls A-
bridge. 530.
Constit. Gallie
tom. 3. tit. 3.
constit. anni
1583. c. 44.
Vide Sir Fran-
cis Moor's Re-
ports Waltham
vers. Mulgar.

Vide the very
Letters of Re-
prizal in Cap. 2.
Letters of
Marque, fol.
32.

Hill. 30, 31
Car. 2. at Ser-
geants Inn.

not to a Piracy. Yet if such a Master of Ship shall carry the lading to the Port appointed, and after retakes the whole Pack or Bale back again, this may amount to a Piracy; for he being in the nature of a Common Carrier, the delivery had taken its effect, and the privity of the Balement is determined.

XVIII. If a Pirate shall attaque a Ship, and the Master for the redemption shall give his Oath to pay a sum certain; though there be no taking, yet is the same Piracy by the *Law Marine*; but by the *Common Law* there must be an actual taking, though it be but to the value of a penny, as to a Robbery on the High-way.

If a Ship shall ride at Anchor, and the Mariners shall be part in their Ship-boat, and the rest on the shore, and none shall be in the Ship; yet if a Pirate shall attaque her and rob her, the same is Piracy.

XIX. A Merchant procures Letters of *Marque* or *Reprise*, and then delivers the Commission to persons to endeavour a satisfaction; if such persons commit Piracy, the Vessel is forfeited without controversie: but the Merchant is no ways liable to make satisfaction; for though the Superior shall answer for the actions of his Ministers or Servants, yet that is introduced by the *Civil Law*; but this question must be decided by the *Law of Nations*, by virtue of which such *Commissions* are awarded or granted, the which does exempt any man to answer for the damages of his servants, unless he foreknew that they would commit such a Piracy or spoliation, or any way have abetted or consented to the same, which right may be forfeited, and the Civil Law let in to acquire satisfaction: And yet in the Case of Sir Edmund Turnor and Mr George Carew, who having Letters of Reprisal against the *Dutch*, Mr. Carew by Indorsement on the back-side of the Letters Patents did nominate and appoint one Tyrence Byrne to execute and perform all such acts and things as by force of the Letters Patents he might lawfully do: Tyrence Byrne provides Ship and Crew, and being at Sea takes a certain Ship belonging to *Bruges* called the *Gadelise*, and there was some probable cause of suspicion, yet not enough to warrant a condemnation: Whereupon the Owners having had sentence of Restitution libelled in the *Admiralty* against Sir Edmund Turnor, Mr. Carew and Byrne so damages; upon

upon which a Sentence was given against the Defendants, *Vid. l. 1. c. 2.* who Appealing, the Delegates confirmed the first Sentence. *S. 15.*

XX. But if a Ship shall be at Sea and in necessity, if she attacks another Ship, and takes out some Victuals, Cables, Ropes, Anchors or Sails, (especially if that other Ship may spare them) this is not *Piracy*; but then the party must pay ready Money for such things, or give a Note or Bill for the payment of the value, if on this side the *Straits of Morocco*, within four Months, if beyond, within twelve Months.

Leg. 2. sect. cum in eadem; D. ad l. Rhod. Leg. quo naufrag. §. quod ait. D. de incen. Leg. quemadmodum, sect. item. D. ad Leg. Aquilian. 27 H. 8. cap. 4. Per Leg. Pomponius de acqu. rei dom.

XXI. By the *Law Marine*, if Goods are taken by a Pirate, and afterwards the Pirate attacks another Ship, but in the attempt is conquered, the *Prize* becomes absolutely the Captor's, saving the account to be rendred to the *Admiral*. And it is accounted in Law a just caption of whatsoever may be got or taken from such *Beasts of prey*, be the same in their own or in their Successors possession. But then an account ought to be rendred to the *Admiral*, who may (if they happen to be the Goods of the Fellow-subject of the Captors, or of Nations in amity with his own Sovereign) make restitution to the Owner, the costs and charges, and what other things in equity shall be decreed to the Captor, first considered and deducted.

Per Leg. Mulier, ca. cap. 17 post.

XXII. By the *Statute of 27 Edw. 3. cap. 13.* if a Merchant lose his Goods at Sea by Piracy, or Tempest (not being wrackt) and they afterwards come to Land; if he can make proof they are his Goods, they shall be restored to him in places *Guildable*, by the King's Officers and six Men of the Country; and in other places by the Lords there and their Officers, and six Men of the Country.

This Law hath a very near relation to that of the *Romans*, called *De Usu-Captione*, or the *Atinian Law*; for *Atinius* Enacted, That the Plea of Prescription or long possession, should not avail in things that had been stoln, but the interest which the right Owners had should remain perpetual; the words of the Law are these, *Quod surreptum est, ejus rei aeterna auctoritas esset*, where by *Auctoritas* is meant *Jus Dominii*.

Sigonius de Jure Rom. l. 1. c. 11.

XXIII. Yet by the *Common Law of England*, it has been held,

Mich. 13 Jac.
in B.R. Sir Ri-
chard Bingley's
Cale, Roll's A-
bridgment, fol.
530.

held, That if a man commit Piracy upon the Subjects of another Prince or Republick (though in League with us) and brings the Goods into *England*, and sells them in a Market *Overt*, the same shall bind, and the Owners are for ever concluded, and if they should go about in the *Admiralty* to question the property, in order to restitution, they will be prohibited.

XXIV. This offence was not punishable by the *Common Law*, as appears by the preamble of the *Stat. of 28 H. 8. cap. 15.* but the same was determined and judged by the *Admiral*, after the course of the *Civil Law*; but by force of the said *Act*, the same is inquired of, heard, and determined according to the course of the *Common Law*, as if the offence had been committed on *Land*.

Coke 3. instit.
tit. Admir.

XXV. This *Act* does not alter the offence, or make the offence Felony, but leaves the offence as it was before this *Act*, viz. Felony only by the *Civil Law*, but giveth a mean of Tryal by the *Common Law*, and inflicteth pains of death, as if they had been attainted of any Felony done upon the *Land*. The Indictment must mention the same to be done upon the high *Sea*.

Moore 756.
 But if the party be attainted before the *Admiral*, and not before the Commissioners, then there is no corruption of Blood or forfeiture of Lands; *quod nota. Co. Instit. 389. vid. postea S. 29.*

XXVI. A Pardon of all Felonies does not extend to this offence, but the same ought especially to be named; and though there be a Forfeiture of Lands and Goods, yet there is no corruption of Blood, nor can there be an Accessory of this offence, tried by virtue of this *Statute*; but if there be an Accessory upon the *Sea* to a Piracy, he must be tried by the *Civil Law*.

The *Statute* of 35 H. 8. cap. 2. taketh not away this *Statute* for Treasons done upon the *Sea*, nor is Clergy allowable to the party on the *Statute* 28 H. 8. vide 14 Jac. in B. R. *Moore 756. plac. 1044.*

XXVII. Though a Port be *Locus publicus uti pars Oceani*, yet it hath been resolved more than once, that all Ports, not only the Town, but the Water is *infra corpus Comitatus*.

Hyde and others robbed the Ship of Captain *Stue*, of the Merchandize of one Mr. *Moss*, a Merchant in *London*; and they were indicted for it at the *Common Law*, and were found guilty of the same, Anno 22 Car. 2. at the *Old-Baily*.

If a Pirate enters into a Port or Haven of this Kingdom, and a Merchant being at Anchor there, the Pirate assaults him and robs him, this is not Piracy, because the same is

not done *super altum Mare*; but this is a down-right robbery at the *Common Law*, for that the Act is *infra corpus Comitatus*, and was inquirable and punishable by the *Common Law*, before the Statute of 28 H. 6. cap. 15.

XXVIII. So if such a Piracy or Robbery be made in a *Creek or Port*, in such cases it has been conceived, that Clergy is allowable upon the Statute of 28 H. 8. but if it be done *super altum Mare*, there no Clergy is allowable; howbeit, if such a Robbery be committed on great Rivers within the Realm, which are lookt upon as common High-ways, there perhaps Clergy may not be granted, and so it was rul'd in the aforesaid Case of *Hyde*, who with a parcel of Men, came one night in Boat in the River of *Thames*, and under the Colour of Press-Masters, Boarded the Ship of one Captain *Slue*, and rob'd her, and for which being taken and tryed at the *Old-Baily*, by the greater opinion of the Judges there present, 22 Car. 2. had Clergy denied him. By the Pardon of all Felonies, at the *Common Law*, or by the Statute-Law, Felony *super altum Mare* is not pardonable; for though the King may be pardon this offence, yet being no Felony in the eye of the Law of this Realm, but only by the *Civil Law*, the Pardon of all Felonies generally extends not to it; for this is a special offence, and ought especially to be mentioned.

XXIX. A Man attainted by virtue of that Statute, forfeits his Lands and Goods, yet there works no corruption of Blood, by virtue of that Attainder; nor can there be any Accessory of Piracy by the Law of this Realm; but if it falls out that there is an Accessory upon the Sea, such Accessory may be punished by the *Civil Law*, before the Lord Admiral, but he cannot be punished by virtue of this Act, because it extends not to Accessories, nor makes the offence Felony.

XXX. If one steals Goods in one County, and brings them into another, the party may be indicted in either County; but if one commits Piracy at Sea, and brings the Goods into a County in *England*, yet he cannot be indicted upon the Statute, for that the original taking was not Felony, whereof the *Common Law* took cognizance.

XXXI. If a Man is taken on suspicion of Piracy, and a Bill

Sir Fran. Moore
756. 1 Jac.

par. 1044.

And the same was so ruled by the opinion of Sir Lyonel Jenkins, and the rest of the Lords the Judges, upon the Piracy committed by Cusack and others; and he was afterwards executed Anno 1674. vide 19 E. 3. Cor. 124. 9 H. 4. 2.

9 E. 4. 29. cited in Cokes 3. Instit. fol. 112.

28 Eliz. Butlers Case cited 3. Instit. fol. 113.

Marsh's Case
13 Jac. in B.R.
3 Bullstrodf. 27.

Bill is preferred against him, and the Jury find *Ignoramus*; if the Court of Admiralty will not discharge him, the Court of Kings Bench will grant a *Habeas Corpus*, and if there be good cause, discharge him, or at least take Bail for him: But if the Court suspects that the party is guilty, perhaps they may remand him; and therefore in all cases, where the Admiralty legally have an original, or a concurrent Jurisdiction, the Courts above will be well informed before they will meddle.

Telverton 134,
135. Scadings
Case, Tenchver-
sus Harrison B.
R. Sciles 171,
340.

If a Man be in custody for Piracy, if any aids or assists him in his escape, though that matter is an offence at Land, yet the Admiralty having Jurisdiction to punish the principal, may have likewise power to punish such an Offender, who is lookt upon *quasi* an Accessory to the Piracy; but to rescue a Prisoner from an Officer of theirs, they may examine the cause, but they cannot proceed criminally against the Offender.

30 Eliz. 3. par.
2 Dors. 24. de
audiend. &
terminand.
Mercatoribus
super mare de-
pradatis.
Pat. 6 E. 1. m.
24. Dors. the
Case of Will.
de Dunstaple,
a Citizen of Winton. Pat. 32 E. 1. m. 4. Dors. pro Willielmo Perin & De-
mengo Perez Mercatoribus.

XXXII. Anciently when any Merchants were robbed at Sea, or spoiled of their Goods, the King usually issued out *Commissions* under the *Great Seal of England*, to inquire of such depredations and robberies, and to punish the parties; and for frauds in Contracts, to give damages to the parties, and proceed therein *secundum Legem & consuetudinem Angliae, secundum Legem Mercatoriam, & Legem Maritimam*; all three Laws included in the *Commissions*.

Pasch. 13 Jac.
in B. R. King
vers. Marsh.
Bullstrodf. 3. part.
fol. 27.

XXXIII. The Courts of *Westminster* have a Sovereign power to inquire after the liberty of every man, and that he should not be deprived of the same without just cause; and therefore as in other Capital causes, so likewise in this they may send their *Habeas Corpus* to remove the Body of any committed upon such an account, and if they see a just cause, they may either Bail, or discharge, or remand, as the matter shall seem just before them.

Coke 3. Instit.
fol. 112.
* Sess. Admir.
Feb. 18. 1680.
Case of Compton
Cyther & al.

And although the Statute of 28 H. 8. c. 15. does not alter the offence, or make the offence Felony, but leaveth the offence as it was before that Statute, (*viz.*) Felony only by the *Civil Law*, and gives a mean of Tryal by the *Common Law*, and inflicteth such pains of death as if they had been attainted of any Felony; yet it was resolved * by all the Judges,

Judges, and the rest of the Commissioners then present, that His Majesty having granted Letters of Reprisal to Sir Edmond Turnor and George Carew, against the Subjects of the States General of the United Provinces, and that afterwards that Grant was called in by Proclamation, then mortified in the Treaty of Breda, and afterwards superseded under the Great Seal: That Carew (without Turnor) having deputed several to put in Execution the said Commission, who accordingly did; and being indicted for Piracy, the same was not a Felonious and a Piratical Spoliation in them, but a Caption in order to an Adjudication; and though the Authority was deficient, yet not being done by the Captain and his Mariners, *animo depredandi*, they were acquitted.

E

CHAP.

C H A P. V.

The Right of the Flag, as to the acknowledging
the Dominion of the British Seas.

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| <p>I. Considerations general as in reference to the same.</p> <p>II. Whether Princes may have an exclusive property in the Sea.</p> <p>III. That such an exclusive Dominion may be, and proved.</p> <p>IV. Of the Sea, whether capable of Division as the Land.</p> <p>V. Considerations general as in reference to Maritime Cities touching Sea-Dominion.</p> <p>VI. Of the Sea, by reason of its instability, whether capable of subjection.</p> <p>VII. Of the Dominion of the British Sea asserted long before, and ever since the Conquest of this Isle by the Romans.</p> <p>VIII. The duty of the Flag, but a consecutive acknowledgment of that Right, and of the Ordinance</p> | <p>of Hastings declaring that Customary obedience.</p> <p>IX. Considerations had on some Treaties, in reference to the asserting the duty of the Flag.</p> <p>X. Of the extent how far that duty is required and payable.</p> <p>XI. Of the duty of the Flag, not a bare Honorary salute, but a Right.</p> <p>XII. Of the importance and value of the same as well in Nations Foreign, as in England.</p> <p>XIII. Of the effects of such a Right and Sovereignty. Of the extent of this Dominion by the Laws of England.</p> <p>XIV. Of the duty of the Flag not regarded as Civility, but commanded as a duty.</p> <p>XV. Of the importance of that acknowledgment.</p> |
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I. **A**fter the Writings of the *Illustrious Selden*, certainly it's impossible to find any Prince or Republick, or single Person indued with reason or sense, that doubts the Dominion of the British Sea, to be entirely subject to that Imperial Diadem, or the duty or right of the Flag, which indeed is but a consecutive acknowledgment of that ancient Superiority: yet there have not been wanting some, who though they have not questioned the former, have highly disputed the latter.

But there are some fatal periods amongst our Northern Regions, when the Inhabitants do become so brutal and prejudicate, that no obligation of Reason, Prudence, Conscience, or Religion can prevail over their passions, especially if they become the devoted Mercenaries of an implacable Faction *, in opposition to all that can be cal-

* Love, &c.

led either just or honourable; we need not rip up the carriage of that late insolent Son of a *Tallow Chandler*, whose deportments made him no less insupportable at home, than he was amongst *Foreign Princes*; the testimonies of his greatest parts and abilities being no other than Monuments of his *malice* and hatred to this Nation, and Records of his own *folly*. But Princes are not to be wrangled out of their ancient *Rights* and *Regalities* by the subtil Arguments of *Wit* and *Sophistry*; nor are they to be supplanted or overthrown by malice or Arms, so long as God and good men will assist, in which his Sacred Majesty did not want, when he asserted his Right with the Blood and Lives of so many thousands that fell in the dispute.

II. That Princes may have an *exclusive property* in the *Sovereignty* of the *several parts of the Sea*, and in the *passage*, *Fishing* and *shores*, is so evidently true by way of fact, as no man that is not desperately impudent can deny it: the considerations of the general *practice* in all Maritime Countries, the necessity of *Order* in mutual Commerce, and the *Safety* of mens persons, Goods and lives, hath taught even the most *Barbarous Nations* to know by the Light of *Humane reason*, that *Laws* are as equally necessary for the Government and preservation of the Sea, as those that negotiate and trade on the firm Land; and that to make *Laws* and to give them the *Life* of Execution, must of necessity require a *Supream Authority*; for to leave every part of the Sea and shores to an *Arbitray* and *promiscuous use*, without a correcting and securing power in case of wrong or danger, is to make men in the like condition with the Fishes, where the greater devour and swallow the less.

III. And though the Sea is as the *High-way*, and common to all; yet it is as other *High-ways* by Land or great Rivers are, which though *Common* and *Free*, are not to be *usurped* by private persons to their own entire service, but remain to the use of every one: not that their Freedom is such, as that they should be *without protection or Government* of some Prince or Republick, but rather not *exclude* the same; for the true Ensign of liberty and freedom is *protection from those that maintain it in liberty*.

IV. And as the Sea is capable of protection and Government, so is the same no less than the Land subject to be divided amongst men, and *appropriated to Cities* and

See that Plea of *Chizzola* for the *Venetian* Sovereignty of the *Adriatick* Sea, at the end of Mr. *Selden*.

Potentates, which long since was ordained of God as a thing most natural: whence it was that *Aristotle* said, *That unto Maritime Cities the Sea is the Territory, because from thence they take their sustenance and defence*; a thing which cannot be, unless part of it might be appropriated in the like manner as the *Land* is, which is divided betwixt Cities and Governments, not by equal parts, or according to their greatness, but according as they are able to rule, govern, and defend them: *Berne* is not the greatest City of *Switzerland*; yet she hath as large a Territory as all the rest of the twelve *Cantons* put together: The Cities of *Norwemburg* and *Genoa* are very rich and great, yet their Territories hardly exceed their Walls: and *Venice* the Mistress and Queen of the *Mediterranean*, was known for many years to be without any manner of possession on the firm Land.

V. Again on the Sea, certain Cities of great force have possessed large quantities thereof; others of little force have been contented with the next Waters.

Neither are there wanting examples of such, as notwithstanding they are Maritime, yet having fertile Lands lying on the back of them, have been contented therewith without ever attempting to gain any *Sea-Dominion*; others who being awed by their more mighty Neighbours, have been constrained to forbear any such attempt; for which two causes a City or Republick, though it be *Maritime*, yet it may remain without any possession of the Sea. God hath instituted *Principalities* for the maintenance of Justice to the benefit of Mankind; which is necessary to be executed as well by Sea as by Land: *S. Paul* saith, that for this cause there were due to Princes *Customs and Contributions*.

The Substance
of what was al-
leged by the
*Hanfiatic*ue
Towns, at the
Venetian asser-
ting of the So-
verainety of
the *Adriatick*,
*Inter res com-
munes, ut ipse
Imper. tor nu-
merat mare, &
ideo nemo in
mari piscari,
aut navigare
prohibetur, &
adversus inhi-
bentem competit*

*actio injuriarum, l. 10. si quis in mare, l. injuriarum, sect. ult. de injuriis. Sin littora quoque communia sunt, l. 2. re divis. Quia accessorium sunt maris, & accessorium sequitur naturam Principalis, l. 2. de peculio. legat. c. accessorium de reg. jur. in 6. Ad litus maris igitur accedere quisvis potest, non piscandi tantum gratia, sed etiam edificandi & occupandi causa, l. quod in litt. de acquir. rer. Dom. l. in litt. ff. nequid in loc. pub. Jo. Angelius f. c. de re pub. Hanfiat. par. 6. fol. 85. Edit. Francos. An. Dom. 1541. But these arguments were easily answered by the *Venetian* Lawyers; Quemadmodum communio littorum restringitur ad populum, a quo occupata sunt, lib. 3. sect. littora. D. de. quid in loc. pub. Ita etiam communio maris: adeo ut per mare a nemine occupatum navigatio sit omnino libera: per mare autem occupatum ab aliquo Principe ii liberam habeant navigationem qui sunt illi Principi subjeti; alii vero eatenus, quatenus idem Princeps permittit. *Julius Pacius de Dom. maris A. hatic.**

It would be a great absurdity to praise the well Govern-
ment and defence of the Land, and to condemn that of
the *Sea*; nor doth it follow, because of the vastness of the
Sea, that it is not possible to be governed and protected:
but that proceeds from a defect in Mankind; for Desarts,
though part of Kingdoms, are impossible to be governed
and protected, witness the many Desarts of *Africk*, and
the immense vastities of the *New World*.

VI. As it is a gift of God, that a *Land* by the Laws and
publick Power be ruled, protected, and governed: so the
same happens to the *Sea*; and those * are deceived by a
gross equivocation, who aver that the *Land*, by reason of
its *stability*, ought to be subjected, but not the *Sea*, for
being an unconstant *Element*, no more than *Air*; foras-
much as they intend by the *Sea* and the *Air* all the parts
of the fluid *Elements*, it is a most certain thing, that they
cannot be brought under *subjection* and *Government*, be-
cause whilst a man serves himself with any one part of
them, the other escapes out of his power; but this chan-
ceth also to *Rivers*, which cannot be detained: but when
one is said to rule over a *Sea* or *River*, it is understood not
of the *Element*, but of the *Site* where they are placed: the
Water of the *Adriatick* and *British Seas* continually runs
out thereof, and yet is the same *Sea*, as the *Tyber*, *Poe*,
Rhine, *Thames*, or *Savern*, are the same *Rivers* they were
a thousand years since; and this is that that is subject to
Princes by way of *Protection* and *Government*.

Again, it would seem ridiculous if any man would assert
that the *Sea* ought to be left without *Protection*, so that
any one might do therein well or ill, robbing, spoiling,
and making it unnavigable, or whatsoever should seem
fitting in their eyes; from all which it is apparent, that
the *Sea* ought to be governed by those to whom it most pro-
perly appertains by the Divine disposition.

VII. When * *Julius Caesar* first undertook the Invasion
of this *Isle*, he summoned the Neighbouring *Gauls* to in-
form him of the *Shores*, *Ports*, *Havens*, and other things
convenient that might accelerate his intended *Conquest*,
but from them nothing could be had, they answering, All
commerce and traffick, and visiting their *Ports*, was inter-

* *Grocius mare
liber: m. Com-
muni parit dis-
cordi. m: quod
communiter pos-
sideretur, ratione na-
turali negligi-
tur: Habet com-
munio rerum ge-
renda un diffi-
cultatem, Leg.
pater. §. dulcis-
sim. Leg. 2.*

* *Quia omnia
fere Gallis erant
incozita, neque
enim tempore
præter mercato-
res acit ad illos
quisq; am, neque
ammutum*

ex ipsis quidquam præter oram maritimam atque eas Regiones qua sunt contra Ga-

est. *Com. Gall. Bell. lib. 4. fol. 72. m. 8.*

* *Gauls Town* near *Yarmouth* being then, as is conceived, one of the common places of *Mart* or *Commerce* for the *Gauls*.

Quod omnibus *fre Gallis* *ho-* *stibus nostris in-* *de sub ministra-* *ta auxilia in-* *telligebat.*

Tacit. in vita *Agricol.*

† *Altitonantis* *Dei largi-flua* *elementa, qui est* *Rex Regum;* *Ego Edgarus* *Anglorum Basi-* *leus, omnium-* *que rerum, In-* *sularum Oceani* *que Britanniam* *circumjacent.*

cunctarumque Nationum que infra eam includuntur, Imperator & Dominus. Ex Chart. fundam. *Eccles. Wigor.* Sir John Burroughs fol. 21. *Idem quoque Edgarus 400. Naves congregavit, ex quibus omni anno post Festum Paschale 100. Naves ad quamlibet Anglia partem statuit; sic aestate Insulam circumnavigavit; hyeme vero judicia in Provincia exercuit. Ex Ranulph. Cestrens. fol. 22. J. B.*

dicted to all Nations before licence had; nor could any but Merchants visit the same, and then had they places assigned them whither they should come; nor was this Dominion that the Britains then used, commanded without a Naval Force; the sight of which when Caesar saw, he preferred them before those of the Romans: for upon that occasion it was that Caesar, having seen those Auxiliary Squadrons, which the Britains sent the Gauls in their Expeditions against the Romans, took occasion to find out that warlike People, whose bare Auxiliary Aid shook the Flower of the Roman Squadrons.*

And when the Romans became Conquerors of this Isle, the same Right or Dominion was during all their time, supported and maintained when they sailed round their new atchieved Conquests in the time of Domitian, Agricola, giving terrour to all the neighbouring Nations.

But when that Mighty Empire became subject to Fate, and this Nation by the continual supply of Men, which went out of the kingdom to fill up the contingencies of the Roman Legions, became at last so enfeebled as to render us a Prey to the Saxons; which Empire having settled peace with their Danish Neighbours and quieted their own home-bred quarrels; and having reduced the several petty Kingdoms of their Heptarchy under one Diadem, they forgot not to assume their ancient Right and Dominion of the Seas; as did the most Noble Edgar †, who kept no less a number than 400 Sail of Ships to vindicate and ascertain his Dominion, giving protection to the peaceable, and punishment to the offenders: nor did his Successors Ethelred, Canutus, Edmund, and others that followed of the Danish Race, any ways wave, relinquish or lose that Royalty, but obsequiously maintained the same down to the Conquerour and from him since for some upwards of 1200 years in a quiet and peaceable possession.

To mention the Ancient Commissions, and exercise of this Sovereign power, Safe-conduits, Writs of Seizure, Arrests, Records of Grants, and Licences to pass through the Sea,

Sea, and to fish, *Parliament Rolls* and the like, * would make a Volume; in a word, if *Right of Prescription, succession of Inheritance, continual Claim, matter of Fact, consent of History and Confessions*, even from the mouths and pens of *adversaries*, be of any moment to the asserting of a Title, his Sacred Majesty may be presumed to have as good a Title to that, as the most absolute Monarch this day on Earth, hath to whatever he can claim or does enjoy.

* So fully proved by Mr. Sel-den, that it would be impertinent in this Tract to rehearse the authorities he vouches.
Vide Jac. V.

ser. Armach. Episc. Hibernia Sylloge p. 121, 163.

VIII. Now the duty of the Flag is no more but a consecutive acknowledgment that the *Right and Dominion* of the *British Seas*, (not as a bare *Honorary Salute* or *Ceremony*, but as an *absolute sign* of the *Right and Sovereignty* of those *Seas* where they are obliged to strike Sail) are in him to whose *Flag* they vail, and pay that duty to; and in substance is no more but that the King grants a general Licence for Ships to pass through his Seas, that are his Friends, paying that obeysance and duty, like those services when Lords grant out Estates, reserving a *Rose* or *Pepper Corn*, the value of which is not regarded, but the remembrance and acknowledging their *Benefactors Right and Dominion*.

That this hath been an *Ancient Custom*, always waiting on that Sovereignty, appears by that memorable Record upwards of 400 years since made, where it is declared by King *John* what the *Ancient Custom* was, in these words; That if a Lieutenant in any Voyage, being ordained by Common Council of the Kingdom, do encounter upon the Sea any Ships or Vessels, laden or unladen, that will not strike and bail their Bonnets at the Commandment of the Lieutenant of the King, but will fight against them of the Fleet, that if they can be taken, they be reputed as Enemies, and their Ships, Vessels, and Goods taken and forfeited as the Goods of Enemies, although the Masters or Possessors of the same would come afterwards, and alledge, that they are the Ships, Vessels, and Goods of those that are Friends to our Lord the King, and that the Common People in the same be chastised by imprisonment of their Bodies &c. & their Rents, by discretion.

Inter Reges. M. rinas sub fine anni regni Regis Johannis secundi. Entitled, Le Ordonnance al Haflings.

Leon. Lessius de
justit. & jur.
l. 2. c. 2. dub. 19.

Thus this *Immemorial Custom* was by that prudent Prince affirmed, the which hath been always before, and ever since (without interruption by all Nations) constantly paid to the *Ships of War*, bearing the *Royal Standard*, and other of His Majesty's *Ships*, wearing his *Colours* and *Ensigns of Service*; he knowing that undoubted *Maxime of State*, That Kingdoms are preserved by reputation, which is as well their strongest support in Peace, as their chiefest safety in time of War; when once they grow despised, they are either subject to Foreign invasions, or Domestic troubles, the which (if possible) that Prince would have prevented, but he lived when those Celestial Bodies, which govern the actions of Princes, seemed to frown on the most Virtuous and Wise.

IX. And as there is no Nation in the World more tender and jealous of their honour than the *English*; so none more impatiently tolerate the diminution thereof. Hence it was that in all Treaties, before any thing was ascertained, the *Dominion of the Seas*, and striking the *Top-sail* was always first provided for.

In the Year 1653. after the *Dutch* had measured the length of their Swords with those of this Nation, and being sensible of the odds, had by their four *Ambassadors* most humbly besought Peace, this very Duty of the *Flag* was demanded by the 15th. Article, in these words:

Note, That Cromwell was the first that ever inserted any such Article into any Treaty: our Right and Dominion over the *British Sea* having never been disputed before, but by an immemorial prescription and possession transmitted to us, and supposed as unquestionable by all Princes. Novem. 15. 1653.

That the *Ships* and *Vessels* of the said United Provinces, as well *Men of War* as others, be they in single *Ships*, or in *Fleets*, meeting at Sea with any of the *Ships* of this State of England, or in their service, and wearing the *Flag*; shall strike the *Flag*, and lower their *Top-sail*, until they be passed by; and shall likewise submit themselves to be visited if thereto required, and perform all other respects due to the said Commonwealth of England, to whom the *Dominion* and *Soveraignty* of the *British Seas* belong.

This was so peremptorily demanded, that without the solemn acknowledgment of the *Soveraignty* over the *British Seas*, there was no Peace to be had; that as to the acknowledgment of the *Soveraignty* and the *Flag*, they were willing to

to continue the *Ancient Custom*, but that of *Visiting* was somewhat hard: 'tis true the latter Clause was by the *Usurper* waved, for reasons standing with his private interest; but the first was (with the addition of these words *Leo ab Aitzma fol. 247.*) — in such manner as the same hath been formerly observed in any times whatsoever) made absolute by the 13th Article between Him and that Republick, in these words: *Item quod Naves & Navigia dictarum Fœderatarum Provinciarum, tam bellica & ad Hostium vim propulsandam instructa, quam alia, quæ alicui è Navibus bellicis hujus Reipublicæ in maribus Britannicis obviam dederint, vexillum suum è malis vertice detrahent. & supremum velum demittent, eo modo, quo ullis retrò temporibus, sub quocunque anteriori regimine unquam observatum fuit,* and from thence it was transcribed into the 10th Article at *Whitehall*, and afterwards into the 19th Article at *Breda*, and from thence into the 6th Article made last at *Westminster*, and that Clause of searching of each others Ships made reciprocate, by the 5th Article made in the Marine Treaty at *London*; but that extends not to Ships of War, but only to the Ships of Subjects. *Sept. 14. 1662.*

X. By the *British Seas* in the Article about the Flag, are meant the four Seas, and not the Chanel only; for in the 16th Article they did express what was meant by the *British Seas* *.

What the Inhabitants and Subjects of the United Provinces may with their Ships and Vessels furnished as Merchant Men, freely use their Navigation, sail, pass and repass in the Seas of Great Britain and Ireland, and the Isles within the same, commonly called the British Seas, without any wrong or injury to be offered them by the Ships or People of this Commonwealth; but on the contrary shall be treated with all love and friendly offices, and may likewise with their Men of War — not exceeding such a number as shall be agreed upon — sail, pass and repass through the said Seas, to and from the Countries and Ports beyond them; but in case the said States General shall have occasion to pass through the said Seas with a greater number of Men of War, they shall give three Months notice of their intention to the Commonwealth, and obtain their consent for the passing of such a Fleet, for preventing of jealousy and misunderstanding betwixt the States by means thereof.

* But now by the last Treaty at *Westmin.* the dominion is ascertained from Cape *Finisterre* to the middle Point of the Land *Van Statén* in *Norway*, *Feb. 9. 1671.*

Artic. 16. in the Treaty of *Nov. 15. 1653.*

The

The first part of this Article doth plainly set out the extent of the *British Seas*, and that it is not the bare *Channel* alone that comprehends the same, but the four *Seas*: and the same is further explained in the Great Case of *Constables*, * where the *Dominion* of the *Queen* (before the union) as to the *Seas*, did extend mid-way between *England* and *Spain*, but entirely between *England* and *France*; the *French* never had any right or claim to the *British Seas*: for in the Wars between *Edward the First* and *Philip the Fair*, (all Commerce on both sides being agreed to be free, so that to all Merchants whatsoever there should be *inducia*, which were called *sufferantia Guerra*, and Judges on both sides were appointed to take cognizance of all things done against these *Truces*, and should exercise *Judicium secundum Legem Mercatoriam & formam sufferantia*) it was contained in the first provision of that League, that they should defend each others Rights against all others; this afterwards occasioned the introducing that Judgment in the same Kings time, (before those Judges, chosen by both the said *Princes* by the *Proctors* of the *Prelates*, *Nobility*, and *High Admiral* of *England*, and all the *Cities*, *Towns*, and *Subjects* of *England*, &c. unto which were joined the suffrages of the most Maritime Nations, as *Genoa*, *Catalonia*, *Spain*, *Almain*, *Zeland*, *Holland*, *Frieze-land*, *Denmark* and *Norway*, and divers other Subjects of the *Roman Empire*) against *Roger Grimbold*, then *Admiral* of *France*, for that there being Wars between *Philip King* of *France* and *Guy Earl* of *Flanders*, he had taken Merchants upon those Seas, in their Voyage to *Flanders*, and despoiled them of their Goods; whereas the Kings of *England* and their Predecessors (as they all jointly do declare and affirm) without all controversie beyond the memory of Man have had the Supreme Government of the *English Seas*, and the *Islands* thereof.

Prescribendo scilicet Leges, Statuta atq; interdicta armorum, naviumque al. ac Mercatoriis armamentis instructarum, causationes exigendo, tutelam prebendo, ubicumque opus esset, atque alia constituendo quacunque fuerint necessaria ad pacem, jus & aquitatem conservandam inter omnimodae rates tam externas quam in Imperio Anglicano comprehensas qua per illud transierint; supremam iisdem isem fuisse atque esse tunc;

* Hill 29 Eliz.
B.R. the Queen
and Sir John
Constable's Case
Leonard 3.
part 72.

Selden de Dom.
Maris l. 2. c. 14.
27. 28.

Rolls Abridg.
2. part. 174.

Coke 4. Instit.
142.

An universal
consent of all
Nations.

lam; merum mixtum Imperium in iudicando secundum dictas Leges, Statuta, praescripta & interdicta, aliisque in rebus que ad summum Imperium attinent in locis adjudicatis.

Which memorable Record apparently shews, that the Kings of *England* have had *istud regimen & dominium exclusive* of the King of *France* bordering upon the same Seas, and of all other Kings and Princes whatsoever: and it was there adjudged that *Grimbald's* Patent was an usurpation on the King of *England's* Dominion, and he adjudged to make satisfaction, or if he proved unable, then the King his Master should, and that after satisfaction he be rendred to punishment.

4. Instit. 142.
Selden cap. 27.
Mare clausum.

Sir John Burroughs fol. 42.

And as to the second part of the *Articles* of giving notice, it was but an Act of Common prudence; their late unexpected visit, which they then gave, put the *English* to some surprise; but they facing the *Batavian*, soon made them know that they were as capable of beating them home, as they were then daring in coming out, and were not to be braved out of a *Dominion* and *Right*, which their Ancestors had with so much glory acquired and asserted.

XI. By the *Article* of the Offensive and Defensive League between *France* and the *United Provinces*, it was agreed, That if at any time the *Dutch Fleet* (— which were to scour the *French Coasts* in the *Mediterranean* from *Pirates*) should at any time meet the *French*, the *Admiral* of the *Dutch* was to strike his *Flag* and lower his *Top-sail* at his first approach to the *French Fleet*, and to salute the *Admiral* of *France* with Guns, who was to return the said salute by Guns also, as was usual when the *Dutch* and *English Fleet* did meet.

Anno 1635.

Leo ab Aitzma
Hist. Traict. pacis Belg. pag.
177. Edit. Lugduni Batavor.
quarto 1654.

Only in this the right of the *Flag* of *England* differs from that claimed by the *French*; for if there had been a failure on the part of the *Dutch*, of paying that respect to the *French*, the same would have amounted to no more but a breach of the *League*: but the not striking to the King of *England's* *Flag*, is open *Rebellion*; and the *Article* does so signify, for it is there mentioned as a *Right* and *Sovereignty*, not a bare *Dominion* only, like that of *Jerusalem* to the King of *Spain*. 'Tis very true, the refusing of it is an absolute annulling of the *Treaty*; for though in the *League* with *England* it is mentioned, yet there is nothing of any concession

cession granted by the same, but only recognized there as a Fundamental of the Crown and Dignity of the Kings of England; nor was the same ever so much as mentioned in any former Treaty before O. P's. time, as we have already mentioned, but it was always a Clause in the Instructions of the *Admiral* and the Commanders under him, That in case they met with any Ships whatsoever on the *British Seas* that refused to strike Sail at the Command of the Kings *Admiral* or his Lieutenants, that then they should repute them as Enemies (without expecting any declared War) and destroy them and their Ships, or otherwise seize and confiscate their Ships and Goods; and these Instructions amongst others continue to this day. The like are given by the *Venetians* to their Captains in reference to the *Adriatick Sea*, and by several other Princes.

XII. The Duty of the *Flag* that hath been so constantly paid to our *Ancestors*, is of such advantage to the continuing the renown of this Nation, that it serveth to imprint new reverence in *Foreigners* that render it, and adds new courage to those of our *Seamen* that exact it: and since we know how much it imports a State that it be revered abroad, and that *Repute* is the principal support of any Government, it equally influenceth the Subjects at Home, and *Foreign Allies* abroad. And as there is no Nation in the World more tender of their Honour than the *English*, so none more impatiently tolerate the diminution thereof. With what resentments would not only the more *Generous* and *Noble*, but even the *Popular* and *vulgar Seamen* detest this or any succeeding Age, should they remit or lose that *Regality*, those acknowledgments which their Predecessors with so much Glory asserted, and the neglect whereof was always punished as open *Rebellion*? the indignity of such an Action being sufficient to inflame the whole Kingdom. The consideration of which, besides his Sacred Majesties own Royal inclination to the same, and his evident testimonies never to abandon a Ceremony of so high a concernment; witness the exposing the one half of his own heart his *Royal Highness*, in the asserting the same, with such *Fleets* and in such *Battels*, that no Age or time can shew a Memorial of the like, are causes sufficient to create in us new flames of love to those *Royal Patriots* and Defenders of our Rights. *Private Persons*
move

move in another Sphere, and act by other Rules than *Sovereign Powers*; the regard of credit with them may oftentimes yield to those of utility or other motives; the *Publick* receives little injury thereby, nor is their wisdom questioned for such *punctilio's*, if they relinquish them for other Emoluments or Peace sake; but *Sovereigns* cannot so transact, their Subjects the People participate in their Honour and Indignities; they have a property, a direct *Right* in the former *: *Sovereigns* cannot alienate or suffer their Honours to be impaired, because it is not really *theirs*, it appertains to the *Nation* universally, and they are all effectually injured by such transactions, either because the indignity really extends to *them*, or because the *Government* and *Authority* is thereupon *weakened* and prejudiced, which is the greatest of *Civil detriments*: that can befall a People, though *ordinarily* they are not aware thereof.

*fontes usi sint eodem à condita Urbe, quo indicarent in minimis quoque rebus antiquæ consuetudinis momenta servanda. Proxime enim ad Deum accedit Antiquitas, æternitatis quædam imagine. Grot. de Antiq. Reipub. Batav. in Præfat. * Vide the Earl of Shaftsbury's Speech to the Parliament 1672. Cæteris mortalibus in eo stare consilia, quid sibi conducere putent: Principum diversam esse sortem, quibus præcipua rerum ad summam dirigenda. Tacit. Annal. lib. 4. Si fama tua videtur necessaria, rectam muneris tui administrationem non potest condonare. Lessius de Inst. l. 2. c. 11. dub. 24. §. 26.*

As Prudence doth thus distinguish betwixt the demeanor of *Private* and *Publick* persons, so doth *Charity* it self; for though the *Gospel* precepts do oblige particular persons to bear injuries and contumelies with patience, and to surrender even the *Coat* as well as the *Cloak*; yet is not this so to be construed, as if even private *Christians* were to yield up their *Civil Rights* to every insolent one that would inroach upon, and usurp them, or that they were to deprive themselves of those *Reparations*, which the *Law* and *Government* affords them; neither is it so to be understood as if the *Civil Magistrate* in *Christendom* might not secure himself of that obedience and reverence, which is due unto dignity, but bear the *Sword* in vain.

XIII. This being the *value* which this *Nation* did always place upon the *Right of the Flag*, the which they never did regard only as a *Civility* and *Respect*, but as a principal *Testimony* of the unquestionable *Right* of this *Nation* to the *Dominion* and *Superiority* of the adjacent *Seas*,
acknow,

acknowledged generally by all the Neighbour States and Princes of Europe, and must be paid and acknowledged by all Princes in the World, that shall be or pass on the same.

The effects of this *Dominion Universal* or *Sovereignty* which accrue to a Prince are these :

*Joan. Palatinus
de Dom. Maris
lib. 1. c. 11.
Sir Henry Con-
stables Case,
Coke 5. part
fol. 107.*

1. Not only the Regality of the fishing for Pearl, Coral, Amber, &c. but likewise the advantage of all Fish Royal, as Whales, Sturgeon, &c. and not only those, but also the direction and disposal of all other Fish according as they shall seem to deserve the regards of the Publick, as in *Spain*, *Portugal*, &c. is used.

*Grotius de Jure
Bellis, l. 2. c. 3.
§. 15.*

2 The prescribing of Laws and Rules for Navigation, not only to his own Subjects, but unto other Strangers, whether they be Princes of equal strength and dignity with himself or any way inferior. Thus the *Romans* did confine the *Carthaginians* to equip out no Fleets, and forbade *Antiochus* to build any more than twelve Ships of War : and if Tradition informs me right, *Queen Elizabeth* interdicted the then *French King* to build any other or more Ships of War than what they then had, without her leave first obtained. The *Athenians* prohibited all *Median* Ships of War to come within their Seas, and prescribed to the *Lacedemonians* with what manner of Vessels they should sail. All Histories are full of such Presidents which Princes have Enacted either upon Agreements enforced upon the Conquered, or Capitulations betwixt them and others their equals or inferiors for mutual conveniences.

*Joan. Palatinus
ubi supra.
Julius Paucinus
de Dom. Maris
Adriatici.*

*13 H. 4. fol. 14.
Coke 5. part,
fol. 63. Case
Chamberlain
of London.*

3. The power of imposing Customs, Gabels, and Taxes upon those that navigate in their Seas, or otherwise fish therein, which they do upon several rightful claims, as protecting them from Pirates, and all other Acts of Hostilities, or assisting them with Lights and Sea-marks, for which advantages common Equity obligeth those that reap benefit thereby, to repay it with some acknowledgment, which ought to be proportioned according to the favour received, and the expence which the Prince is at to continue it unto them.

4. As it is incumbent on a Prince duly to execute Justice in his Kingdoms by Land, so the Sea being his Territory, it is requisite and a necessary effect of his Dominion, that he cause Justice to be administered in case of Maritime Delinquences.

5. That

5. That in case any Ships navigate in those Seas, they shall salute his floating Castles, the Ships of War, by *hurling the Top-sail, striking the Flag* (those are the most usual courtes) in like manner as they do his Forts upon Land; by which sort of submissions they are put in remembrance, that they are come into a Territory wherein they are to own a Sovereign Power and Jurisdiction, and receive Protection from it.

These are the proper effects of a real and absolute Sovereignty over the Seas, which how they are possessed by the *Venetians*, this ensuing account will declare.

The Gulph of *Venice* is nothing else but a large Bay or Inlet of the Sea, which entring in betwixt two Lands, and severing them for many Miles continuance, in the end receives a stop or interruption of further passage by an opposite shore, which joyns both the opposite shores together: It is called the Gulph of *Venice*, from the City of *Venice*, situate upon certain broken Islands near unto the bottom thereof: it is also called the *Adriatick* Sea, from the Ancient City *Adria*, not lying far distant from the former; from the entrance thereof unto the bottom it contains about six hundred *Italian* Miles, where it is broadest it is an hundred and sixty Miles over, in others but eighty, and in most an hundred. The South-West shore is bounded with the Provinces of *Puglia* and *Abruzzo* in the Kingdom of *Naples*; the Marquisate of *Ancona* and *Romagnia* in the Popes State; and the Marquisate of *Trevisana* in the *Venetian* State: The North part of it, or bottom, hath *Friuli* for its bounds; the North-East is limited by *Istria*, *Dalmatia*, *Albania*, and *Epirus*: whereof *Istria* doth not so entirely belong to the *Venetians*, but that the Emperour as Arch-Duke of *Gratz*, doth possess divers Maritime Towns therein; in *Dalmatia*, saving *Ziara*, *Spalato*, and *Casaro*, they have nothing of importance, the rest belonging to *Ragusa* and the *Turks*: in *Albania* and *Epirus* they possess nothing at all, it being entirely the *Turks*; so that he who shall examine the circuit of the Sea, which must contain about twelve hundred Miles, shall find the shores of the *Venetian* Signory not to take up two hundred of them, omitting some scattered Towns and dispersed Islands lying on the *Turkish* side of the *Adriatick* shore.

'Tis very true of late by the great Conduct and good Fortune of the Generals *Morosini* and *Coning-marke*, they have now got *Alba Regalis*, and almost the principal parts of the *Morea*.

For

Baptista Nani
his History of
Venice, lib. 11.
fol. 446, 447,
448.

For the securing hereof from the depredations of Pirates, and the pretences of divers potent Princes, as the Pope, Emperour, King of *Spain*, and the Great *Turk*; who each of them have large Territories lying thereupon; also to cause all Ships which navigate the same to go to *Venice*, and there to pay Custom and other Duties, the Republick maintains continually in action a great number of Ships, Gallies, and Galliot; whereto also they add more, as there may be occasion, whereof some lye about the bottom of the Gulph in *Istria*, others about the Islands of *Dalmatia* to clear those parts of Pirates, who have much infested those Seas and others; and those of most force have their station in the Island of *Corfu* and *Standia*; in the first of which commonly resides the Captain of the *Gulph*, whose office is to secure the Navigation of the *Gulph*, not only from the *Corsaires*, but to provide, that neither the Gallies or Ships of the Pope or King of *Spain*, nor Great *Turk* do so much as enter the same, without permission of the Signory, and upon such conditions as best please them, which they are so careful to effect, that in the Year 1638. the *Turkish* Fleet entring the *Gulph* without Licence, was assailed by the *Venetian* General, who sunk divers of their Vessels, and compelling the rest to fly into *Valona*, he held them there besieged, although the same City and Port whereon it stands, be under the Jurisdiction of the *Grand Signior*; and notwithstanding that a great and dangerous War was likely to ensue thereupon betwixt the *Grand Signior* and the *Republick*, because the *Venetian* General being not content to have chased them into their own Ports, did moreover than that sink their Vessels, and landing his Men, slew divers of their Mariners, who had escaped his fury at Sea; yet after that a very honourable Peace was concluded again betwixt them, wherein amongst other things it was agreed, That it should be lawful for the *Venetians*, as often as any *Turkish* Vessels did without their licence enter the *Gulph*, to seize upon them by force, if they would not otherwise obey, and that it should likewise be lawful for them so to do within any Haven, or under any Fort of the *Grand Signiors* bordering on any part of the *Venetian Gulph*: So jealous hath this *Republick* been in all times to permit any to sail the *Gulph*, that in the Year 1630.

(as *Palatius* relates) that *Mary*, Sister to the King of Spain, being espoused to the Emperour's Son *Ferdinand* and King of Hungary, the *Spaniards* designed to transport her from *Naples* in a Fleet of their own, the *Venetians* suspected that they had an intention hereby to intrench upon, and privately to undermine, by this specious Precedent, that Dominion of the Sea which the Signiory had continued inviolate time out of mind; and that they took this opportunity when *Venice* was involved with a War abroad, and infested with the Plague at home, and therefore not in a condition to oppose their progress. The *Spanish* Ambassador acquainted the State, that his Master's Fleet was to convey the Queen of *Hungary*, being his Sister, from *Naples* to *Triesti*: The Duke replied, That her Majesty should not pass but in the Gallies of the Republick; the *Spaniard* replied thereat, pretending that they were infected with the Plague: the Senate being consulted, came to this Resolution, That the Sister of his Catholick Majesty should not be transported to *Triesti* any other way, than by embarking in the *Venetian* Gallies, according to the usual manner of the Gulph; and that if the Ambassadour would acquiesce therein, her Majesty should be attended and used with all that respect and deference which became her Quality: but if she proceeded any other way, the Republick would by force assert her proper Rights, and attack the *Spanish* Navy as if they were Enemies, and in Hostile manner invade them. Whereupon the *Spaniard* was compelled to desire the favour of them to transport the Queen in their Gallies, which *Antonio Pisano* did perform with much State and Ceremony; and the Courtesie was acknowledged by the Courts of the Emperour and King of Spain.

XIV. The Maritime Dominion by the Laws of England were always accounted the *Four Seas*; such as are born thereon are not *Aliens*, and to be within them is to be within the Legeance of the King and Realm of England.

The Records in the days of *Edward the Third* and *Henry the Fifth* proclaim it, that those Kings and their Progenitors had ever been *Lords of the Sea*: and amongst those many great instances of proving the Sovereignty of the same, is that famous Record of *Edward the First* and *Philip the Fair of France*, in which were the *Procurators* of most Nations bordering upon the Sea throughout Europe, as

De Domin. Maris
rit., l. 2. c. 6.

Selden Mare
Claus. l. 2. c. 24.
Fitzherb. protection.
tit. 46.
Seld. ibid. c. 23.
Coke 4. Instit.
fol. 142.

the Genoeses, Catalonians, Almaines, Zelanders, Hollander, Fricze-landers, Danes, and Norwygians, besides others under the Dominion of the Roman German Empire, where all joyntly declare, That the Kings of England, by right of the said Kingdom from time to time, whereof there is no memozial to the contrary, have ben in peaceable possession of the Sovereign Lordship of the Seas of England, and of the Isles within the same, with power of making and establishing Laws, Statutes, and Prohibitions of Arms, and of Ships otherwisse furnished than Merchant Men use to be, and of taking surety, and affording safeguard in all cases where need shall require, and of ordering all things necessary for the maintaining of Peace, Right and Equity among all manner of people, as well of other Dominions, as their own passing through the said Seas, and the Sovereign Guard thereof.

Vide part of
the Record.

By which it plainly appears, That the Kings of England had then been in peaceable possession of the said Dominion by immemorial Prescription, that the Sovereignty belongeth unto them, not because they were *Domini utriusque ripe*, when they had both England and Normandy, and were Lords of both shores; for Edward the First at that time had not Normandy) but that it is inseparably appendant and annexed to the Kingdom of England, our Kings being Superiour Lords of the said Seas, by reason (as the very Record mentions) of the said Kingdom: and since that the Sovereignty of the Sea did always appertain unto the English King, not in any other Right than that of the Kingdom of England; no Prince or Republick ought or can doubt the Title by which our present Claim is deduced; 'tis in right of *Britannia*, that the same is challenged, 'twas in that right the Romans held it: the Claim justified Edward the Third and his Rose Noble, though there are other reasons regarding the Lancastrian Line, which yield a Colour for the use of the Port-cullis in the Royal Banners of England; yet as in reference to the Maritime Dominion, Henry the Eighth did the Realm, but the Sea the Dominion; and as the loss of one Province doth not infer that the Prince must resign up the rest; so the loss of the Land Territory doth not by concomitancy argue the loss of the adjacent Seas. It is no more necessary that every Sea-Town should command an hundred Miles at Sea, than that each City should command an hundred Miles by Land. *Julius Paucinus de Domin. Maris Adriatici.*

And the Case
29 Eliz.in B.R.
Sir John Con-
stables, Leonard
3. part. 72. the
reason of the
opinion there
is mistaken;
for the right
unto the Sea
arisech not
from the pos-
session of the
shores; for the
Sea and Land
make distinct
Territories,
and by the laws
of England the
Land is called

embellish

embellish his *Navy Royal* therewith, and *Queen Elizabeth* stamped it upon those *Dollars* which she designed for the *East India Trade*, signifying her power of shutting up the Seas, if she thought fit (as by a *Port-cullis*) with the *Navy Royal*; this *Dominion* of the *British Seas* did Authenticate the Proclamation of *King James*, ordaining the *Flemish* at *London* and *Edinburgh* to take licence to Fish: this justified the like Proclamation by the late *Royal Martyr King Charles*, and warranted by the *Earl of Northumberland* in his Naval Expedition.

Anno Domini
1600.

Anno Domini
1609.

Anno Domini
1636.

That *Prescription* is valid against the *Claims* of *Sovereign Princes* cannot be denied, by any who regard the *Holy Scripture*, reason, the practice and tranquillity of the World: and that true it is, the modern *Dutch* have pretended, if not dared, to challenge the Freedom to Fish in the *British Seas*, by *Prescription*; but it is likewise as true that *Prescription* depends not upon the *Coporeal* but the *Civil* possession, and that is retained, if claim be but made so often as to barr the *Prescription*, the which hath been always made evident; first by frequent *Medals*, next by punishing those that refused it as *Rebels*, by guarding of it; and lastly by giving *Laws* time out of mind on it, which evidently proves that the *Civil* possession is not relinquished; and our *Kings* constantly claiming the *Dominion* of the same, none else pretending, all *Nations* acknowledging it to be in them, and the same never questioned, till those modern *Dutch* (of yesterday) arose.

Will Fulbeck's
Pandects of the
Law of Nations
cap. 4.

The King against Sir John
Byron, Bridgman, fol. 23,
24, 25.

XV. The importance of the *Dominion* of the Sea unto this Nation, is very great, for on that alone depends our Security, our Wealth, our Glory; from hence it is that *England* hath a Right to all those advantages and emoluments, which the *Venetian Republick* draws from the *Adriatick Sea*, where the Ships of the *Grand Signior*, of the *Emperour*, *King of Spain*, and *Pope* pay Customs, to maintain those *Fleets*, which give *Laws* to them within the *Gulph*; 'tis hereby that the *English* can shut up or open these Seas for Ships or *Fleets* to pass or repass them; whereto *Queen Elizabeth* had so special a regard, that when the *King of Denmark* and the *Hansatick Towns* solicited her Majesty to permit them free passage, they transporting Corn into *Spain*, she refused them; and when a *Protestant Fleet* of *Hamburgers* and others, had

Vide postea in
Chap. of Cu-
stoms.

June 30. Anno
1598.

Selden lib. 1.
cap. 11.

Albert. Gentil.
Hisp. Advocat.
l. 1. c. 14. Vide
Mr. Secretary
Cook's Letter to
Sir Will. Boswell
April 16. 1635.

* The fight of
the Dutch with
the Spanish
Fleet in the

Downes, 1639. Scilicet hoc factum Hollandorum est contra iustitiam omnem pro certo, & contra reverentiam quæ partibus & territorii debetur alienis. Alb. Gent. Hispan. Advocat.
lib. 1. cap. 14.

presumed to do so, notwithstanding her prohibition, she caused her *Navy Royal* to seize, take, burn, and spoil them, when they were passed her Maritime Territory, within sight of *Lisbon*; yielding this reason for her justification, That they not only relieved her Enemy with provisions, but had presumptuously made use of her Seas, without obtaining her Royal Permission for so doing: 'tis from hence that the Crown of *England* can justly demand an account of any Ship or Ships occurring in those Seas, what's their business, and what their intentions are; and prohibit any Prince or Republick, to enter there with potent Fleets, without preacquainting his Majesty, and obtaining his Royal Permission; without which Dominion and Sovereignty, *England* can never live secure on shore, it being easie for any Foreign Fleets to amuse us with specious pretences, and in their passage to invade and surprise us. Thus while the *Turk* pretended to sail for *Malta*, he occasionally possessed himself of *Canea*, in the Isle of *Candia*, and after having tasted the sweet of that place, never forsook it, till he made himself Master of the whole. Many such Precedents do occur in History: And in fear of such Surprizal, the *Athenians* (being Lords at Sea) did exclude the *Persian* Monarchs from sending any Ships of War into any part of the *Aegean* Sea, *Rhodian*, *Carpathian*, and *Lydian* Seas, and that which tends to the *West*, towards *Athens*; the like caution was used by the *Romans* against *Antiochus* and the *Carthaginians*; and the *Turk* prohibits all Nations, saving his Vassals, to enter the *Black Sea* or *Pontus Euxinus*, and also the *Red Sea*; and that 'tis by virtue and force of this Right that the *British Nation* can drive on their own Commerce, navigate themselves, and permit others securely to trade with them. 'Tis true that the *Dutch* have presumed some years since, to violate the security of the *British Seas*, by the attacking the Allies of *England*, not only, within the *British Seas*, but in her Harbours, attempting to pursue a *French* Vessel up almost to *London*, and have more than once * attacked the *Spanish* Fleets in her Roads, under the protection of her Castles, and that against the

Laws of Nations, and the *Peace of Ports*, in which for the time they seemed to cloud the *Honour of the Nation*, but satisfaction for indignities of that nature, though *slow*, yet are *sure*, and should such as those have been longer tolerated, beloved *Britannia* must become a prostitute, by a Confederation of those *States*, or take *Pass-ports* for her Commerce; but the *Royal Martyr's* goodness was no longer to be trod on, his Heart and his Cause were good, and though those unhappy Times (which were crooked to whatsoever seemed straight) did hinder the accomplishments of his entire intention for *satisfaction*; yet those whom the just *God of Heaven* was pleased for a time to permit as a punishment to this Nation to rule, did not want in the fulfilling; for so soon as he was pleased to stay the fury of the *Intestine Sword*, their hearts took fire from those flames that had formerly been kindled in that *Royal Breast*, and having prepared a Fleet, in order to the treating as Souldiers with Swords in their hands, they were in the like manner assaulted in their Territories in the *Downes* (but the *Dutch* found then what it was (though two for one) to assault a *British Lyon* at the mouth of his *Den*) intending, if possible, to have destroyed the *English Power*, but were frustrated in their design, being severely beaten home to their own doors; and afterwards those that then had got the *English Sword* in their hands, begun to consider that the *Victory* must be pursued, as a season fit to assert their *Ancient Right* and *Soveraignty* of the Sea, and then those people thinking that the odds before was not enough to destroy the *British Fleet*, they equipt out a Fleet greater and far more numerous than the *English*, under the *Admirals, Van Trump, De Witt*, the two *Evertsons*, and *Ruyter*; but they suffered the same Fate as their former, about some thirty four of their *Ships* on the Coast of *Flanders*, burnt and taken, and the rest chased home to their Ports; and not long after followed the total defeat of their *Naval Forces*, accompanied with the death of *Van Trump* by the *English*, under the *Admirals, Blake and Monk*, who had sunk and fired about thirty more of their *Ships of War* (no quarter being given till the end of the Battle) six *Captains*, and about a thousand *Men* were taken Prisoners, and about six thousand slain. Of their *Presumptions* since

Ann^o Domini
1552.

June 2, and 3.

About the 8. of
Aug. 1633.

(amongst other things) in denying the duty of the *Flag*, and what punishment and check they have had for the same, to what condition they have been reduced, and made to acknowledge that *Dominion and Superiority* to that *Crown* (under which their *Ancestors* humbly * be- sought the acceptance of the *Sovereignty* of the *Nether- lands*, might be annexed and protected) is now fresh in our memories; so high and of so great importance is this *Dominion and Sovereignty* signified by the *Duty of the Flag* in the *British circumjacent Seas*.

* Offered to
Queen Eliz.
Cette-cy entre
autres merite
bien une consi-
deration speci-
ale, Que la con-
junctio desdits

Pays de Hollande, Zelande, Frize, & des Villes de F. Esche, & Ostende en Flandres, avec les
Royaumes de vostre Majesté, emporté par soit l' Empire de la Grande Mer Occidentale; & par con-
sequent une assurance de Felicité perpetuelle pour les Sujets de vostre Serenissime Majesté;
John Stows Supplement to Hollingshed, An. Dom. 1585. Vide Sir Walter Raleigh,
lib. 5. cap. 2. §. 2, & 3.

CHAP.

C H A P. VI.

Of the Right of Pressing or Seizing of Ships
or Mariners for Service Publick.

- | | |
|--|--|
| <p>I. That such Right is excepted in the Law of Dominion.</p> <p>II. Whether the Ships of Nations who are in War at the same time, may be pressed, the danger being equal.</p> <p>III. Whether this Right extends to Ships to fight, and no more, or gives a power to trade.</p> <p>IV. By the Laws of England the King may seize.</p> <p>V. The reason why such power was vested in the Admiral.</p> <p>VI. That such a Right of compelling</p> | <p>Men to serve in Naval Expeditions may be.</p> <p>VII. Objections legal refuted.</p> <p>VIII. Of the ancient punishment of such deserters of the Kings service.</p> <p>IX. Concerning the several Statutes this day in force touching Mariners and Souldiers.</p> <p>X. Whether it be lawful for a private Man to execute Justice on such as fly and desert the service.</p> <p>XI. Where a general Commission is given to Men to execute Justice.</p> |
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I. **T**HE Civil Law, though it can command nothing which the Law of Nature forbids, nor forbid what it commands; nevertheless it may circumscribe natural liberty, and prohibite what was naturally lawful: and also by its force *antever* that very Dominion, which is naturally to be acquired. Hence it is that Princes, by the Law of Nations, may acquire a Right of use, of things that do belong to private persons; for property hath not (as hath been said) swallowed up all that Right, which rose from the common state of things; because as all Laws are to be construed as near as possible to the intention of the Makers, so we must consider what was the mind of those that first introduced singular Dominions: now the Rule to construe that, must be as near as possible to natural equity, and that in extreme necessity that old right of using things should revive as if the things had remained common, the same standing with the interest of all humane Constitutions; and therefore in the Law of Dominion extreme necessity seems excepted. Hence it is that the Vessels and Ships of what nature or Nation soever

Enra, aut mal
aut necessario
facinore retin-
da. Liv. lib.
24.

* *F. de Navibus non excus.*
C. l. 11. tit. 3.
 and *Pekius* on
 the same Law.

* that shall be found riding in the Ports or Havens of any Prince or State, may be seized on, and employed upon any service of that Sovereign that shall seize the same, being but a harmless utility, not divesting the Owners of their interest or property.

II. If a Ship of the King of *Denmark* be in the Port of *London*, and the *Swede* is in War with that Prince; and it happens at that time the King of *Britain* is in War with the *Spaniard*, now the Possessor is here pressed with an equal necessity, and by the same argument is rather obliged to the defence of his own Country than another, whether by the Law of Nations the Ship ought to be detained, hath been doubted; most certain they may: who would not pluck a shipwrackt Man from his plank, or a wounded man from his Horse, rather than suffer himself to perish? to slight which is a sin, and to preserve, the highest of wisdom; besides, in the taking of the Vessel the right is not taken from the Owner, but only the use, which when the necessity is over, there is a condition of restoring annexed tacitly to such a seizure.

And doubtless the same right remains to seize the Ships of War of any Nations, as well as those of private interest, the which may be employed as occasion shall present: So the *Grecians* seized † on Ships of all Nations that were in Ports, by the advice of *Xenophant*; but in the time provided food and wages to the Mariners.

III. Whether this Right extends so far as to give Princes a power to seize in order to traffick may be some question; certainly if the Traffick be for such Commodities, as *Masts*, *Timber*, *Tar*, *Powder*, *Shot*, or other Commodities or Accoutrements of Arms, or Naval provisions of offence necessary for the defence of the Realm, it may be done (but then it is just, *freight* * should be paid) for what hurt can it do me to let another have my Boat to pass over a Ford, if he rewards me? and if that be answered, the Owners are at no prejudice, for this is but a harmless utility.

IV. By the Laws of *England* there is no question, but the King may seize, and it appears by very many ancient Records, that he might do it; and it was one of the Articles of Enquiry amongst others, *Item, soit enquis de* *seiz*, *qui sont arrestez pour le service du Roy, ou pour* *autre*

Quidni enim
(inquit Cicero)
quando sine de-
trimento suo po-
test, alteri com-
municet, in iis
que sunt accipi-
enti utilia, dan-
ti non molesta?
1. de offic. 1.

† *De Expeditione*
Cyri.

10 *Ed. 3. m. 16.*
 12.

* 23 *Ed. 1.*
Rot. 77. in the
Exchequer.

12 *E. 3. in the*
Black-Book of
the Admiralty
p. 26. and 27.
6 Job. m. 11.
9 Job. m. 3.

autre raisonnable cause per les Officers du Roy, ou de l'Admiral, & debzissent l'Arrest, & par les quelles abant- dices Pesis sont emmenez & retamer les Mariners qui sont ordonnez pour le service du Roy; & si retrarent, & en cas que homme soit endite qui la debzisse l'Arrest en la Pef arrestee pour le service du Roy, & de ce soit conbide par it. il perdra la Pef si l'na grace du Roy ou du hault Admiral, & pour ce quil a este plusieurs fois debatue en Angleterre pour les arrestes des Pesis, quant le Roy amande Sergeants d'Armes, ou autre Ministres pour arrester Pesis au oeps du Roy, & les Seigneurs des Pesis sont venus debant l'Admiral; & allegment que leurs Pesis nestoient mye arrestees, ordonne estoit au temps du Roy Richard le Primier a Grimsby per abbis de plusieurs Seigneurs du Royalme, que quant Pesis seront arrestees pour service du Roy, que le Roy escripza par Ces Lettres Patentes a l'Admiral d'arrester les Pesis plus ou moins a la bouillente du Roy, & selon ce quil a besoin, & l'Admiral escripza au Roy ou au Chancelier d'Angleterre les noms des Pesis ainsi arrestes assemblement avec les noms des Seigneurs & Maistres d'icelles, & en tel cas le Seigneur de la Pef ne le Maistre ne viendront pas a dire que la Pef nestoit mye arrestee ne a ce ne seront opz. and that upon such Arrests broken, the parties might be punished and fined.

24 Ed. 2. m. 17.
11 R. 2. m. 13.
Rott. Franc.

Again, *Inquiratur si arrestatus, ad serviendum Regi fre-
git arrestum, hujusmodi transgressor stat in gratia Regia sive
Admiralli sui iurum voluerint committere Carceribus manci-
pandum vel finem facere, in hac parte si arrestum hujusmodi
factum manifestum fuerit cognitum.*

De Offic. Admi-
ral. Anglie per
Roughon, Artic.
10.

If the Admiral by the Kings Command arrests any Ships for the Kings service, and he or his Lieutenant return and certifie the Arrest or a List of the Ships arrested into Chancery, no Master or Owner of the Ships so arrested shall be received to plead against the return, pur ceo que l'Admiral & son Lieutenant sont de record.

The Black-
Book of the
Admiralty, fol.
28, 29. & 157,
158.
15 R. 2. c. 3.

Item, *Inquirendum de omnibus Navibus quæ ad servien-
dum Domino Regi super mari arrestate fuerint, & postea
Domini possessoris, sive Magistri dolo & fraude a servito hu-
jusmodi se subtraxerunt in deceptionem Domini Regis, qui
si inde postea indictati fuerint, & convicti super hoc, naves
sua Domino Regi forisfactæ per ordinationem Domini Regis*
Richardi

Richardi Primi; & si Domini, Possessores, vel Magistri huiusmodi inde coram Domino Rege & Cancellario suo per aliquas allegationes se aut naves huiusmodi excusare voluerint, si Admirallus vel locum tenentes sui per Literas suas Patentes de arresto huiusmodi facto fidem fecerint pleniorum, Domini, Possessores, aut Magistri predicti nullo modo audiri debeant, sen eis fides quovis modo adhiberi, eo quod Admirallus & locum tenentes sui sunt de recordo.

Cro. Arg. of
Hampdens C.
called the Ship
money C. fol.
79, to 100.

And if the Ship so arrested break the Arrest, and the Master or Owner thereof be indicted and convicted debant l' Admiral by the Oath of twelve men, the Ship shall be confiscate to the King, which power the General maintains in all places where he has power, and the same seems to be provided for in the latter Clause of 15 R. 2. C. 3.

Spelmani Con-
cil. Tom. fol.
520, 521.

By King Ethelred, his Bishops and Nobles in the General Council of Elnam, Anno 1009. for the setting out a Fleet every year, and the punishment of those who hurt or spoiled any Ship, or deserted the service, especially if the King was present in the Expedition, amongst others it was Enacted, *Si quis Navem in Reipub. Expeditionem designatam vitaverit, damnum integre restituito & Pacem Regi violatam compensato; si vero ita prorsus corruperit, ut deinceps nihili habeatur: plenam luito injuriam & lasam prateres Majestatem.* So Sir Henry Spelman's Version out of the Saxon Copy renders it, but the ancient Copy hath it more largely.

Spelmani fol.
528. expeditio
Navalis.

Naves per singulos annos ob patria defensionem & munitionem praparentur, postque Sacrosanctum Pascha cum cunctis utensilibus competentibus simul congregantur; qua igitur etiam poena digni sunt, qui Navium detrimentum in aliquibus perficiunt? notum esse cupimus, quicunque aliquam ex Navibus per quampiam inertiam vel incuriam, vel negligentiam corruperit; & tamen recuperabilis sit; is Navis corruptelam vel fracturam ejusdem per solidam prius recuperet, Regique, deinde, eaque pro ejusdem munitionis fractura sibi met pertinet. rito persolvat.

Most certain it is, that the Kings of England have in all Ages, by their Writs and Patents, commanded not only the Admiral, but the Wardens of the Cinque-Ports and others, to arrest and provide Ships of War and other Vessels, and impress and provide Masters of Ships, Seamen, Mariners, and all other necessary Tackle, Arms, and

and Provisions for Ships, for the defence of the Sea and the Realm against foreign Enemies, or for transporting of Armies paying their Freight (if not bound thereto by tenure) as well as to elect and provide all sorts of Souldiers, Carpenters, and other Officers to be assistants in their several Expeditions.

Rot. Scotia 10
E.3.m.2.to 17.
and then to 34.
intus & dorſ.
to 28.

But Fishermen or Mariners pressed for the Service, are not to be employed as Souldiers, but only as Mariners; unless it be in cases of great necessity, or bound thereunto by Tenure, Custom, or Covenant.

1 Elix. cap. 13.
Vide Stat. 16,
17 Car. I. c. 15.

And Watermen that shall withdraw themselves in time of pressing, shall suffer a fortnights imprisonment, and be prohibited to row on the Thames.

2 & 3 P. & M.
c. 16.

V. The reason why the Admirals had such power given them, was because they being sometimes called *Capitani*, and *Gubernatores Flotarum*, they had their ordering and governing of the Ships of War and the raising and fitting up such Ships for the Navies, as they thought fit; other times called *Custodes Maritimarum parvium* their duty being to provide all Naval Provisions, as well to supply the Kings Navies occasions, as to gratify any other of the Kings Friends, when distress should constrain them to touch in his Ports, that his Subjects might receive the like retaliation again; they were called *Capitanei Nautarum & Marinellorum*, as in reference to the deciding all differences amongst those in the Kings service, and punishing of such as transgressed; and as the place was great, so the power was large, especially in all things belonging to the Navy-Royal, in which they had the Supreme rule and Government in all things belonging to it. He sat formerly in the Kings House, and there kept his Court, as the French Admirals do at this day at the Marble-Table, in the Kings House at Paris.

Vide Sir Henry
Spelmans Gloss.
in tit. Admir.
Lambert Ar-
cheion tit. Ad-
miral. fol. 42.

And although there seems no question but the King may press Ships, yet there have been those who seem to doubt, if not to question, whether he may press men to serve; for my own part I think he may, my reasons are these: It is lawful for every man to addict and yield up himself to whom he pleaseth, as appears both out of the Hebrew Law and Roman Law; why then may not any people, being at their own dispose, give up themselves to their Prince or Sovereign, so as to transcribe the right

Exod. 21. 6.
Instit. de Jure
person. §. servi
autem. Ged. l. 2.
c. 7.

of

Of pressing Ships and Mariners.

of commanding their aid and help, as often as need shall require (it is not here inquired what may be presumed in a doubtful case, but what may be done in point of right) most certain such a power may well be done, and that grounded on great reason; as if the Common-wealth should happen to be invaded by such a one as seeks not only the subversion of the Government, but the destruction of the people, and they can find no other way to preserve themselves, but that the Supreme power should be vested with such a Prerogative, as to enforce or press the Inhabitants to serve in Arms in the defence of the same, and the contempt of which to punish; or if they should be oppressed with want, and that supplies of provisions can no ways be had, but by compelling another by force to exhibit the common offices of humanity to a Nation in whose Territories a famine rages, that the Inhabitants should on such extraordinary occasions be compelled by force to serve in Arms.

And this Dominion may be obtained several ways; either by a voluntary resignation to a Conqueror, as they of Capua to the Romans, *Our Land, the Temples of our Gods, all Divine and humane things we yield up into your hands, O ye Conscript Fathers.* Again, Freedom may be granted to all by a Conqueror, except Mariners, which should in cases of necessity be excepted, or that some Prince, who will not suffer any Mariner to go out of his Dominions, without subjecting themselves to such a reasonable command, besides the Majority of Nations on such grounds, may abdicate from a part of them the entire Freedom of that member.

Tacitus.

Coke 2. Instit.
fol. 358.

Nor are there examples of this kind wanting; the Germans are every one Master of his own House, but are almost on every occasion subject to their Lords, especially in their Goods. The Irish Cosherers, which were reprehensions, when the Chief Lord and his Retinue came to his Tenants house, they fed upon his provisions till they were spent, all being solely at their devotion. And as to the Sea, the King of Britain may at this day restrain Merchants or Mariners to pass out of the Realm, without licence; and the various tenures that are introduced, which

2 E. 1. Memb.
18. Rott. Pat.
2 E. 1. m. 17.
Rot. fin. 31 E. 1.
num. 44. Ro. Pat. 17 H. 6. R. Cla. in dorf. Vide the Case of Bates, in Lane's Reports, fol. 4.

is presumed were since the *Conquest*, were no other but the will of the *Conqueror*; for the right is not measured by the excellency of this or that form, but by the will.

VII. And though it hath been conceived by some, that the King cannot press men to serve in his Wars, giving their reason, that of old he was to be served either by those that held by tenure, those that covenanted by Indenture to provide men, or those who contracted with the Kings Officers for wages and entred into pay, or those that were in prison for the Kings debts; but that only extended to those Wars that were by Land: not one word in all those Acts, or Muster *Rolls*, that any ways mention the least of Mariners; and yet what vast Fleets were in those days? But on the other hand it hath been always accustomed to press such sort of men for the Naval Expeditions. The ancient Records that mention such persons subject to press by Law is that of 49 E. 3. commonly called **The Inquisition of Queenborough*, wherein it was expressly in charge amongst others, to inquire of those Mariners that were pressed for the Kings Service, and deserted the same: So likewise by those other Articles translated by *Roughton*, it is in express charge to the *Jury* to present those that being prest to serve, brake the Kings Arrest, in order to their punishment; and in those days it was esteemed an high offence: and the Oath which the *Jury* then took being impanelled, was this.

Whis here sae My Lord the Admiral, that I Jonathan Nash shal well and truly enquire for our Lord the King, and well and truly at this time then serbe at this Court of th' Admiralty, present at moch, as I habe acknowledged, or may habe by information of eny of my fellows, of all mane Articles or circumstances that touchen the Court of the Admiralty and Law of the Sea, the which shall be grate to me at this time; and I thereupon swoorn or charged, and of all other that may reneth in my mind, and in shall for nothing lerte, that is for to say, for Franchise, Lordship, Kindred, Alliance, Freindship, Love, Hatred, Envy, Enemitee, for dyed or lost of Goddne, for none other case that I shall see doe, the Kings Counseils, my fellows, mine owne, will and truly bele what oute fraude or malengyn, so God me help at the holy dome, and by this Book.

Coke 6. part. Case of Soldier. Vide the 1 Institures, fol. 71.

And the Stat. which provides punishment for those Watermen who shall hide themselves, does evidence what the Common Law was as to the right of pressing, which certainly would never punish those whom they could not press.

** 2. Apr. 49 E. 3. in the Black Book of the Admiralty 32, 33, 34. Art. and fol. 69. Art. 10.*

The Black-Book of the Admir. fol. 17.

VIII. And

Lamb. inter Leg.
Edouar. f. 139.
13 Car. 2. cap. 9.

VIII. And as the enquiry was strict, so was the punishment very great: *Item, qui fugiet à Domino vel socio suo pro timiditate belli vel mortis in conductione Hereticis sui in expeditione navali vel terrestri, perdat omne quod suum est, & suam ipsius vitam, manu mittat Dominus ad terram quam ei antea dederat.*

IX. In the Service of the King two sorts of persons were always capacitated to attend the *Navy Royal* in their Expeditions, the one a Salt-water Land-Souldier, the other a compleat Mariner or Sailer: It was a doubt, whether such a Souldier, departing from the service, were subject to any other punishment than that of *Martial Law*, which can at no time be executed in *England* but when the King's Standard is in the Field; thereupon it was provided,

9 H. 7. cap. 1. That if any Souldier being no Captain, immediately retained with the King, which shall be in wages and retained, or take any prest to serve the King upon the Sea, or upon the Land beyond the Sea, depart out of the Kings service without licence of his Captain, that such departing be taken, deemed, and adjudged Felony. And that all the Justices in every Shire of *England*, where any such offenders be taken, have power to enquire of the said offences, and the same to hear and determine as they do and may do of Felony, &c. expressed in the Kings Commission to them made, as though the same offences were done in the same Shire; and also that the departing of such Souldiers, and also their Retainers, if it be traversed, be tryed in the same Shire where they are for such a Cause arrested and arraigned. The Justices have here a concurrent power to enquire and try, but it does not shut out the Sovereign Courts, or hinder, but the King may try them upon a Commission of Oyer and Terminer, or Gaol-delivery. It was a doubt conceived by some of the late Judges, if a man had ran from his Colours at *Plymouth*, & afterwards was taken in *Middlesex*, and committed to *Newgate*, whether after a Bill is found in *Middlesex* the Justices of Gaol-delivery for *Newgate* could try him; but it was ruled more than once by the greater number of the Judges, they might; and so have the Precedents been always since the making of this Statute, and upon the like reason, that a man that takes a second wife, hath by the Statute the same directions to be tryed in the same Shire where he is taken: yet if taken in *Middlesex*,

Middlesex, was always tryed at the *Old-Bayley* in *London*.

These Statutes were made, because the Statute of 18 H. 6. Cap. 19. was looked upon not to be sufficient, for that that Act had reference only to the ancient Tenures, and those that covenanted with the King to provide Souldiers; whereupon a question afterwards arising, whether several who having then taken prest Money to serve the Queen against the Rebels in *Ireland*, and had departed and withdrawn themselves from the service, should be within those Statutes, in regard some doubt seemed to arise on the same; but it was resolved by all the Judges of *England*, that those two Statutes of 7 H. 7. Cap. 1. and 3 H. 8. Cap. 5. are all one in effect, and were perpetual Acts: the great doubt and question, whether the Statute of 18 H. 6. Cap. 19. did extend to Mariners and Gunners serving on the Seas, and taking wages of the King, was in Parliament not long before cleared in these words: *That the said Statute made in the eighteenth Year of the Reign of H. 6. in all pains, forfeitures, and other things, did, doth, and hereafter shall extend as well to all and every Mariner and Gunner, having taken or who hereafter shall take prest or wages to serve the Queen Majesty, her Heirs and Successors to all intents and purposes, as the same did or doth unto Souldiers, any diversities of opinion, doubt, matter, or thing to the contrary thereof notwithstanding: But now Mariners deserting the Sea-service are particularly within the Provision of 13 Car. 2. Cap. 9. which hath made the offence Death; but the Tryal is by a Court Marshal.*

43 *Elix.*

Coke 6. part. fol. 27.

Rastal doubled in his Abridgment.

And Land-Souldiers, though in time of Peace, are likewise within the Statute of 7 Hen. 7. Cap. 1. and 3 Hen. 8. Cap. 5. if they take any prest Money to serve the King upon the Sea, or upon the Land, or beyond the Sea, and shall desert the Service: but that is Inquirable according to the Course of the *Common Law*, where if the Party shall depart without licence, he shall suffer Death, without benefit of Clergy.

X. If such persons shall so desert the Service, it hath been a Question, whether a private Person under the same obedience meeting with such a Deserter, might not put him to death; it hath been conceived that he might, and

Non solis ducibus aliisque potentibus innasci solet, atque immorari bene

agendi propositum, sed cuique volenti & licet & honestum est ejus quâ vivit Reipublica malo commoveri, & publicas militates pro suis viribus promovere. Vide Grotium l. 2. c. 10.

the

* That is, as to entitle him to Clergy, and so it was ruled by all the Judges in *B. R. M. 23 Car. 2.* in the Case of one—

found specially at *Surrey Assizes* before Mr. Justice *Twisden*, who slew the Adulterer in the very Act. *Vide Augst. de Civit. Dei citatum. C. quicunque, causa 23. qu. 8.*

An. 25 Eliz. Co. Litt. fol 74.

And upon that very reason *Queen Elizabeth* denied the constituting of a *Constable*, for the Tryal of *Sir Francis Drake*, who struck off the head of *Doughy in partibus transmarinis*.

Cod. Justin. tit. quando liceat unicumque.

It was in force in *England* till the begining of the Reign of *Edw. 3.* time *Co. Inst. 128.B. 13 H.4. fol. 4. 5. 37 H.6. fol. 3.*

XI. Hence it is, that every man hath a licence given him to oppose force against plundering, and pillaging Souldiers: and the next the subsequent Law about deserters saith, *Let all men know they have a power given them against publick Robbers and Deserters that run from their Colours, and all are Ministers of revenge for the quiet of all;* to this purpose is that of *Tertullian*, *Against Traytors or publick Enemies every man is a Souldier:* and herein differs the right of killing of Exiles and Outlaws, or those whom they call *Banditoes*, from those kind of Laws, because there proceeds a special Sentence, the Judgment of Banishment or Outlawry being promulgated; but here a general Edict, the fact being evident, obtains the force of a Judgment or Sentence pronounced; the Judgment of the latter must be according to the *Civil Law*, which yet remains still in force, as to the Tryal of such Deserters; which impunity for such killing, seems allowed of at this day by that Law.

C H A P. VII.

Of Dominion established by Treaties of Alliance in general.

- I. Of Treaties their ends.
- II. Of the matters considerable in the making of them, and how the overtures are made.
- III. Of the various sort of Treaties, and first of those by interview.
- IV. Of the pretexs general made to obtain such Treaties.
- V. Of Princes equal the honour is to be paid by him in possession.
- VI. Of Treaties by Princes unequal.
- VII. Of Treaties secret and open.
- VIII. Of things requisite for Princes during such Treaties.
- IX. Of places proper for Treaties.
- X. Princes where obliged to treat personally, and where not.
- XI. Deputies their demeanor generally considered in Treaties.
- XII. Of the Clauses generally to be considered in Treaties general and particular.
- XIII. Of the nature of Treaties generally considered as to their ends, and where they determine by the death or dispossession of a Prince, and where not.
- XIV. Of Treaties to what end, and how they have been strengthened in England.
- XV. Of the causes ordinary procuring such Leagues.
- XVI. Of Leagues by way of Mediation tending to the procuring of a general peace with Warranty.
- XVII. Considerations on Leagues defensive and offensive, and of the advantages and disadvantages thereof in reference to the Estate confederate.
- XVIII. Leagues defensive construed offensive in favour of the oppressor.
- XIX. Contribution, the difficulty in regulating the same to the satisfaction of the persons interested.
- XX. Of Leagues concluded by Deputies, and the difficulties used to delay, by which designs may secretly be carried on.
- XXI. Consideration had on Leagues made for carrying on some particular Enterprize.
- XXII. Of the causes that generally occasion a Rupture.
- XXIII. Of the obligation on Confederates in reference to mutual Succours.
- XXIV. Of Aid granted to particular and common Allies when invaded by one another, and of Protection granted a People when oppressed, whether aid to such may be consistent with a League.
- XXV. Whether the Oath taken for the performance of the League be personal, or binds the Successor, and of the interpretation of the same.
- XXVI. Of Leagues made with Princes when driven out of their Countries, whether they remain valid and firm.
- XXVII. Whether Leagues may be entered into by Christian Princes with Infidels.

Treaties are occasioned by a wise and prudent care of inspecting the motions of Neighbours and of their

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their Affairs, the which are generally reduced to these three Heads upon the Considerations,

1. How a Prince should govern himself with his Neighbours.
2. In gaining a Credit among them, and to have a part in their Deliberations.
3. Is the main, which is to pierce into his Neighbours designs; for those Centers being discovered, a Prince easily knows how to draw his Lines.

II. In Treaties, the first thing to be considered is the manner of making the Overture; and therefore it may so happen, that of two Princes who are Enemies, the one will not seek unto the other for an accord; therefore the general *Medium* is, that the motion be propounded by some greater Prince, or by some Neighbour that is a Friend to both *, and sometimes the Ministers of two Princes meeting accidentally, if they be employed, yet propound an Accommodation. When a Prince or State is exasperated with another, and having gotten an advantage, will often refuse to treat any where but in his own Country, nor that unless first sought to by a submissive request, as by Letter, &c. So they of † *Holland* and *West-Frieze-land* considering the miserable distress and incorrigible disorders of their people, did submit thus to confess their Errors.

* *Argenton* and a Steward of the Duke of *Mantona* meeting at *Creal Carragio*, to condole in their Masters names for the death of the Marquess of *Forcat*, made an overture for

the Treaty of Peace betwixt *Charles* the Eighth and *Lewis Sforse*. † *March 8. 1653.* by order of those States, subscribed *Herbert Van Beaumont*, and afterwards by a Letter from the *States General* praying a Neuter place, *April 30. 1653.* then by a Petition $\frac{1}{2}$ ° *June* after, *Leo ab Aitzma* fol. 317, 818, 825.

III. Treaties are acted either by the interview of Princes, or by persons sufficiently commissioned for that purpose.

Those that are by interview, have been often disapproved, though often practised; but that depends rather on the estate of Affairs, and the conformity and diversity of Honours, and manner of living of the Princes and their people, than of the interview: that of *Lewis* the Eleventh with Duke *Charles* of *Burgundy*, and of the same King with *Edward* the Fourth of *England* past fairly: and in all such Treaties they govern themselves in reference to their supplies, according to the confidence which they repose in each other. * But those interviews of Princes have ever

* *Jugurtha* taken by his Father-in-law *Bocchus* and delivered to the *Romans*; *Charles* the Seventh of *France*, at a personal

Treaty with the Duke of *Orleans*, slew the Duke, though a Sovereign Prince. *Mayer* lib. 15. *Phil. Comines* lib. 4. cap. 9, 10. been

been observed dangerous; for Princes measure their equality, not by the extent of their Dominions, but by the absoluteness of their Power: So that he that is Supreme and independent in his own Country, counteth himself equal to any other Prince, how great soever. Perchance some youthful Kings may disport and solace themselves in one anothers Company, whilst yet pleasure is all the elevation of their Souls; but when once they grow sensible of their own Greatness, (a Lesson they will quickly learn, and shall never want Teachers) then emulation will be betwixt them, because at their interview they cannot so go in Equipage, but one will still be the formost, either his person will be more proper, or Carriage more Court-like, or Attendance more Accomplished, or Attire more Fashionable, or something will either be or be conceived to be more Majestical in one than the other: And Corri-vals in Honour count themselves eclipsed by every beam of State which shineth from their Competitor; therefore some hold the best way to keep great Princes together is to keep them asunder, accommodating their business by their Ambassadors, lest the meeting of their own Persons part their Affections, as it fell out between King *Richard* of England and *Philip* of France, and *Maximilian* the First and *Lewis* the Twelfth.

*Richard Hen-
den in Rich.
fol. 666.*

IV. It is presumed, that the Personal Treaties of Princes are not for matters small and trivial; therefore it is an undoubted Maxim, *That as Jealousies may be increased amongst Neighbours, by reason of such personal interviews, so they must find out some apparent and important pretext, which being made known and published to remove the Jealousies of their Neighbours, they may then under such colour and shadow, treat the most secret of their Affairs.* So Pope Clement the Seventh under the borrowed Pretext of a general Peace and League against the *Turks*, (which sounded pleasingly in the ears of all Princes) at *Marseilles* concluded the Marriage of his Niece with *Henry* the Second of France.

V. But if of two Princes the one goes home unto the other, he is bound to do him the Honour of his House. And if the Prince be inferiour to him, he commonly sends forth some of the principal Officers of his Court to receive him; but if he be his equal in Quality, as being both

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Kings, although there be some debate betwixt them for precedence, if he come first to the place where the Treaty is to be made, he must go in Person and not by Proxy.

Wile. Emilius Paulus his History of France, and *Ferron* his supply of the same, of the life of the Duke of Orleans, afterwards *Lewis* 12th upon the failure of issue male of *Charles* the 8th.

In the interview that was between *Lewis* the Twelfth and *Ferdinand* of Arragon at Savona (which then belonged unto the French King) *Lewis* the Twelfth at the approach of *Ferdinand's* Gally (before he could land) entred into it, accompanied only with his Guard, to testifie his confidence, and thereby to assure King *Ferdinand* of that which he had promised he should find in him; and at their going to Land, King *Lewis* left the right hand to *Ferdinand*, who lodged in the Castle, as the most Honourable place, and himself went to the *Bishoprick*.

VI. By The Laws of *Treaties*, when two Princes unequal in Quality parley, the Inferiour is to come first to the place of congress there to attend the Greater; yet the contrary hath been most commonly observed upon this very reason, that he that is less ought first to wait on the Greater, and from thence go to the place appointed for the Parley; and this was particularly done at the interview of Pope *Clement* the Seventh and King *Francis* the First, although that *Marseilles* were in the King's subjection.

VII. Again, *Treaties* by those that are sufficiently Commissionated for that purpose, are to act either secretly or openly. *Treaties* close or secret are usually made in order to the compleating or settling of Leagues between two Princes or States, sometimes by entertaining him with whom they treat under such a Pretext, to deceive him in the end, at other times to surprize an Enemy, or to assure a Prince of two Enemies, treating with one secretly, the other openly, and the like. These are the ordinary Policies among Princes, and wherewith the wisest of Kings *, and the most knowing Councils have been deceived and abused even to accept of a Treaty, when at the same time the Proposer hath no other thoughts than to betray them: the Spaniards have been famous at these projects. Memorable was that design of theirs to interrupt the League which was ready to be made between the Princes of Italy and Pope *Clement* the Seventh after the Battle of Pavia, propounding unto the Pope to treat and accord, the which not only hindred the League, and staid the preparations

* So *Maximilian* and *Ferdinand* having twice abused *H. 8.* proposed a third, which was that he would resign up the Imperial Crown to *H. 8.* the Resignation is sent

of War which he might make, but also caused him to discharge the Troops which he had drawn unto him for his safety. So *Bourbon*, General of the Imperial Army, entertained the Pope with an accord, whilst his Army marched to the Walls of *Rome*.

to England and approved, H. 8. is to come to *Aquisgrave* to receive the Crown, and *Maximilian* is

to accompany him to *Rome* to receive the last Right of the Imperial Dignity, and having given him the Investiture of *Milan* in *seodo more Imperiali*, then in possession of the *French*, and in enmity with the House of *Austria*: all things being thus concluded, and *H. 8.* having paid the monies agreed on, and made ready his preparations, *Charles* the Fifth and Grandson of *Maximilian*, is a rub in this League, who must be first removed; thereupon the old Fox the Emperour sends a Proposal, that he would come first into the *Netherlands* to take off his Grandson, which while agitating, he strikes up a secret Peace with the *French King*, and so *H. 8.* is betrayed a third time, and the agreement refused to be complied with, *Cotton Treaty of Amity fol. 99.*

VIII. Hence it is, that during Treaties, be they open, or secret, the Princes or States concerned in them, must watch the more carefully, have the diligenter Eye, and by all the ways imaginable reinforce their strength, not only to frustrate their Enemies of all hopes to surprize them, but to the end the consideration of their Force and Opulency may put them in a posture to obtain Conditions of more advantage. Besides, it is an undeniable Maxim, That no Treaty must be held firm, valid, and concluded, unless it be ratified by that Prince or State with whom the same is made, especially if it be with a Prince whom they detain Prisoner; for by † Law the force by the which he hath been constrained to promise, will at least dispense with him so far as to re-advise, if not to break.

† *Sacramentis*
quid m. nos re-
nere qui potuit,
quon projectis
fussit & de-

piso Imperio privatus & captus ipse in alienam venisset potestatem? Curio in *Cesar*, to those that had been the Souldiers of *Domitius* so spake, lib. 11. de *Bello Civili*. Vide *Gror. lib. 2. cap. 13. §. 18.* Pope *Clement* the Seventh refused to ratifie the Treaty with Duke *Ferrara* which he made when a Prisoner, saying, That it was a dishonourable thing for a man in life to ratifie a matter done in his name when dead, not consistent with his Honour nor Interest. So *Francis* the First excused himself to ratifie the Treaty of *Madrid*, upon the inhumanity done to him by the permission of *Charles* the Fifth, they being extorted from him, nor did they take place, though the King left his Children as Hostages.

IX. Again, as in the Parleys of Princes, the place where the interview is to be made is very considerable; so is it in Treaties which are transacted by Ambassadors, Agents, Envoys, &c. If it be to compleat a Peace, or settle a

November 7.
1659.

League, it must not be too far from the Confederates, but at some convenient place, to the end they may have the more speedy Answers from their Principals; but then the first is always to be in some place Neuter, or sometimes upon the Confines of Kingdoms; for that it is neither reasonable or honourable to treat a Peace in the Territory of ones Enemy; but the latter touching Leagues may be any where That of *Edward* the Fourth with *Lewis* the Eleventh was in the Territories of the Duke of *Burgundy*, but that was personal: And that between *France* and *Spain*, concluded by Cardinal *Mazarine* and *Dom Lewis Mendez de Haro*, Plenipotentiaries of both Crowns, was in the Isle of *Pheasants* in the River *Bidassoa* upon the Confines of the *Pirenaean* Mountains. And the last great Treaty which begun at *Cologne* in the year 1673. under the Mediation of *Suedeland*, in order to put an end to that War wherein most of the Crown'd Heads of *Europe* were involved. was lookt upon as a place proper; but the seizing of Prince *William* of *Furstemburg*, and the taking of forty thousand Crowns out of the Waggons of the *French* Ambassador in a Neutral City, broke off that Negotiation; and though the violence committed on this Prince, by the Emperour's Ministers, and the injury done to the *French* King, gave ground to fear, that there was no Peace to be expected, and that the most Christian King would never consent to the renewing of the Treaty, unless reparations were first made for those two injuries: Nevertheless, at the instance of the King of *England* (whose Mediation was generally embraced by all the Princes concern'd in that War) and at the solicitation of the Bishop of *Strasburg*, who publicly declared he preferred the advantages of Peace before the liberty of his own Brother. *Nimmegen* was pitched upon as a place neuter and proper for a Treaty, and thereupon the *French* King 17 February 1675. named for that effect the Duke of *Vitry*, Monsieur *Colbert*, and the Count *D' Avaux*, his Ambassadors.

X. Ambassadors having received Orders to treat, the Prince to whom such are sent, is not by the Law of Treaties bound to treat personally, but only to depute some of his Council for that effect; the reason is, for that the Dignity of a Prince may receive some detriment, which

which cannot be maintained amidst the contestations which happen in Conferences.

But if an Ambassadour be deputed as Lieutenant to a Prince, there indeed such Commissioner is not bound to treat but only with the Prince himself: and so it was where the Bishop of *Gurgis*, was deputed by the *Emperour* to Pope *Julius* the Second; the Pope commissioned three Cardinals to treat with him; but the Bishop having notice in what quality he was like to be received, commissioned three Gentlemen to confer with them, excusing himself upon other affairs, which afterwards was explained, that he came not as a single Ambassadour, but as a Lieutenant to the *Emperour*, in the which Quality he had been received at *Rome* by the *Pope*: yet it hath so happened, that Ambassadours, if not admitted to a personal Treaty, have refused the discharge of their Commission, and so did Chancellor *Marvel*, Ambassadour from the *French* King, who delivering his Message to *Philip* Duke of *Burgundy*, was interrupted by *Charles* the Dukes Son, *I am sent* (said he) *not to treat with you, but with your Father*; and Mr. *Wade*, who being commissioned by Queen *Elizabeth* to *Philip* King of *Spain*; would by no means admit himself to be turned over * to the *Spanish* Privy-Council, but would either have Audience from the King himself, or would return without it.

Julius Ferretus de Legatis Principum, & de eorum facie & officio.

There is commonly in the Instructions provided for the Ambassadour in that point, if the matter should come into debate.

Phil. Comines lib. 1.

* *Can den Eliz. in An. 1534. fol. 30.*

XI. The *Deputies* being assembled, their Seats are considerable, they having no power to quit any thing of the rank which their *Masters* ought to hold; and by the Law of Treaties the first place is at the head or end of the *Table*, (if there be one) the second is the first on the right hand, and the third is the first on the left hand of him that is at the end: and if there be many *Deputies* to one Prince; they usually sit at one side, to have the more facility to confer together, if it be needful.

XII. The Ambassadours having concluded and settled their places, their Commissions of each side are to be inspected and considered: and therefore it is an undoubted Maxim, That when they are general or ambiguous, the Principals have no will to conclude; or if they are fair and plain, yet there may be wanting power to conclude,

So *Julius* the Seccrd did, who finding himself press'd to make Peace with *Lewis* 12. sent Cardinal *Final* and Bi-

shop of *Tivolly* to *Paris*, but never armed them with power to conclude: this was to frustrate the important instance of the Consistory.

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or having power to conclude, it may be with a Salvo, till they are ratified.

The principal Clauses generally are,

1. Either for Peace or Truce.
2. For Restitution of that which they pretend hath been unjustly taken away.
3. For the Cession of Rights.
4. For Limits and Bounds, the which if they cannot regulate, they put them in suspense, or else they make some Act which may interrupt the prescription of him which holds them.
5. For passage, with Consignation of Hostages.
6. For Forts or Castles for Assurances.
7. For an Offensive and Defensive League.
8. For Neutrality.

In the managing of all which, and of all other matters proper for such Treaties, a special regard must be had not to move for a person odious to him with whom the Treaty is made, nor to yield to the first demands though never so just, but resist them stoutly; but if danger is eminent, then it is a certain Maxim, *Not to study so much to Negotiate with advantage, as to provide for safety.*

The Leagues between the Crown of France and Spain, are commonly between Kings and Kings, Realm and Realm, and Man and Man of their Subjects; and hath in time past been lookt upon to be the firmest of Alliances.

XIII. Treaties which are made with our Neighbours as Friends, are called *Treaties of Alliances, equal or unequal*. The *equal* is either of single Friendship only, for the entertainment of Traffick, or for aid and succour; that of succour is for the *Defensive* or *Offensive*; and sometimes for both, with or against all men, or against some certain Princes and Republicks, and their Alliances are contracted, either from *Estate to Estate*, and for the preservation of the *Estates* of each other (in which case by the death of the Prince they may not be interrupted) Or else they are contracted betwixt *Prince and Prince*, and then the death of one suspends till a new Treaty hath confirmed it, unless there is a time certain prescribed by the *Treaty*, to the which the Alliance must continue after the death of the

Phil. Comines lib. 2. cap. 8. And in the very Alliance with France concluded July ²¹/₃ 1667. The first Article is in these words: *That there be an universal and perpetual, true and sincere Peace and Amity between the most Christian King and the King of Great Britain; their Heirs and Successors, and between the Kingdoms, States and Subjects of both, &c. Vide 9 E. 4. 2. a.* The League then made with the Scots, and likewise between Edward the Fourth and the Duke of Burgundy. *Phil. Comin. l. 3. c. 6.*

Prince;

Prince; Or else they are made from an *Estate* to a *Prince*, where the death of the Prince does likewise, if not dissolve, yet at least suspend till a new Treaty of Confirmation of the Precedents, although by the Laws of *England Rex non intermoritur*.

XIV. Sometimes *Alliances* are contracted for an Enterprize and for one effect only, in the part in which the Allies are interess'd, and such are generally called *Leagues*, which in *England* have been sometimes confirmed by Act of Parliament *. * Rot. Pat. 4. H. 5. num. 4. Coke 4. Instit. 156.

Leagues commonly are *Offensive*, but in effect they tend to attempt against some one, and in the bottom are lodged *Articles of Secrecy for the Enterprize*: and such was that of *Cambray* against the *Venetians*, in which they borrowed the pretext of *Religion and the Peace of Christendom*.

which were Pope *Julius* the Second, the *Emperour*, Kings of *France*, *Spain*, and *Arragon*, Anno 1558. Vide History of the Republick of *Venice*, fol. 87. Treaty of Cambray, the Confederates of

XV. The ordinary causes for which *Princes* and *Republicks* make *Leagues*, are either to facilitate a Conquest, as That that was made between *Lewis* the Twelfth and *Ferdinand* of *Arragon*, for the Realm of *Naples*, or to balance the Forces of one that is more mighty, in hindring him that he grow not greater; but Arms ought not to be taken to diminish such a Neighbour's power, for that fear is uncertain; but prudent Leagues may be made for diminishing their power. Sed ut vim pati posse ad vim inferendam jus tribuat, ab omni aequitate abhorret. Grotius de Jure belli & pacis l. 2. c. 15. §. 17.

The *English* made a League to succour the *Hollanders*, not only to balance the growing opulency of the *Spanish* Monarchy, but likewise to encrease her own by the Alliance of the *Dutch*. *Quid sequitur?*

XVI. Again, Leagues may be made for the procuring of a general Peace. by way of *Mediation* of their Neighbours in War, and such was the late Treaty of *Nimwegen* mediated by the King of *England*, and concluded Aug. 10. 1678. between the Ambassadors and Plenipotentiaries of his most Christian Majesty on the one part, and the Ambassadors and Plenipotentiaries of the *Lords States General* of the *United Provinces* on the other part; such was also that League of Union propounded by His now Sacred Majesty, and afterwards concluded betwixt him and the *States General* of the *United Provinces* for an efficacious

League of Union between his Majesty of Great Britain and the States General of the United Netherlands, concluded at the Hague, Jan. 1713 Anno 1668.

cacious Meditation of Peace between *France* and *Spain*. His Sacred Majesty of *Britain* having a prospect to what afterwards happened and of a War, wherein most inevitably would be involved most of the Princes in *Christendom*; to the effecting of which Peace, His Majesty and the *States General* did obtain a promise from the *French King* to the *Dutch*, to lay down Arms, on condition the *Spaniards* would formally and solemnly, by a Treaty of Peace, quit to him all those Places and Forts, together with the *Chastellenies* and their appurtenances, which they by force of Arms had taken in, or fortified in the then last years Expedition; or otherwise that the *Spaniard* be brought to transfer to the *French* all their remainder in the Dutchy of *Luxemburg* (or to the County of *Burgundy*) together with *Cambray* and *Cambresis*, *Donay*, *Ayre*, *St. Omers*, *Bergue*, *St. Avinox*, *Fuernes*, and *Lynk*, with the Bailiwicks, *Chastellenies* and all other their dependencies; and the *French King* to restore to the *Spaniard* all Places, Territories, which they have by Arms taken since their entrance into *Flanders*, on condition that the *States General* do reciprocally undertake and secure to the *French*, to prevail with the *Spaniard* to consent to the same Conditions, which once effected would (as was hoped) initiate the tranquillity and be the interest not only of the two Warring Crowns, but of all other the Princes of *Christendom*. To the effecting of which there were several Articles agreed; and likewise it was agreed, That if a Peace should happen to be made, His Majesty and the *States General* should become Warrantees, and a place left for any other Prince or State to come into the same, who should think it their interest to keep the Peace of *Christendom* undisturbed, and to restore the *Low-Countries* to their tranquillity: there was provision made likewise by the same, for the Forces of each of the Warrantees to be used against those that should break and violate the same, obliging them to cease the violence, and repair the party injured.

But a Defensive War is unjust on his part who gave just cause of War.

XVII. A *Defensive League*, which hath no other benefit but a necessary defence, and in the which mean Estates are in a manner equally interessed, last usually longer than an *Offensive League*, which is voluntary, and from the The Answer of the Ambassador from *Priverium* to the Senate: *Si bonam dederitis, & fidam & perpetuam; si malam, haud diuturnam*, Liv. lib. 8. 21.

which

which either of the *Confederates* will easily part when he hath more interest : So as in *balancing* the interest of the one and the other, he that shall find himself accompanied with distrust; and an opinion to be irreconcilable to the common Enemy, generally proves the most firm in the League.

The *Wisdom, Courage, Means, and Constancy* of the Prince or State is to be considered; so likewise the *distance* of the *Places*, as well in regard of those with whom they unite, as of those against whom they make the Leagues.

XVIII. *Leagues* having no other limitation, but the end of the *Enterprise* for which they are made, have admitted many large debates in cases of accident : For instance, If an Enemy shall take the Country, for the defence whereof the League was made, the Question has been whether the *Confederates* be bound to assist him who hath lost it, in the Recovery; some have held, that the *Defensive* did not extend so far : notwithstanding if there were no Treaty, which had concerned this Conquest, yet it would seem more reasonable to comprehend the Recovery in the defensive, if it be general. For as it hath for its end to preserve the *Allie in his State*, and that to attain unto it, the Forces must not only remain in the Country of the *Allie* to attend the Enemy; but after denunciation and other acts of Hostility done by the Enemy, they must enter into his Country, to the end to prevent him or divert him from attempting any thing against the *Allie*, the *Offensive* being judged by the *aggression*, and not by that which follows; by a stronger reason they ought to enter into the Country conquered from the *Allie*, for the recovery thereof; but excuses in this kind proceed from those who fail in their faith, courage, or means to recover.

what to the League? what to the Gods, the Judges of the League? whom shall I bring unto thee to be the Judge of thy anger and of my punishment? I refuse no people, nor private men.

XIX. *Contribution* is one of the main ingredients in a League, and is of great difficulty to regulate. It is made either in *Men or Money*; the men are entertained by all Parties, or by him only that hath need, or otherwise as the League is. Henry the Eighth made a League with Francis the French King against the Emperor Maximilian and Ferdinand,

Pontius Sannio after restitution made to the Romans, and the author of the breach yielded up, *expiatum* (saith he) *est quicquid ex federe rupto irarum in nos caelestium fuit. Satis scio quibuscumque Diis cordi fuit subigi nos ad necessitatem cedendi res, in non fuisse cordi tam superbe a Romanis seditionis expiationem spectam*: And a little after, What more do I owe to thee, O Roman?

An. 1515. Vide Sir Robert Cotton Remonst. of the Treaties of Amity and Marriage.

Of Leagues by Alliance equal.

dinand, for the Recovery of *Milan*, which he did, for the protection of his Neighbour, and Reduction of the *Swisse* from the *Imperial* side, for which he employed the *Bastard of Savoy*; the agreement was of reciprocal Succour of 10000 men, if the War were by Land, and of 6000 if it were made by Sea; and in all other occasions, the *French* King was bound to assist the King of *England* with 12000 *Lances*, and he the King of *France* with 10000 Foot at his charge that had need.

So where *Contribution* is concluded for Money, there are difficulties that do arise from the *Person* or *Place* where it must be kept; to deliver it into the hand of the strongest, is not safe, for fear they shall not be able to call him to account; to lay it in a weak place, were to expose it to the attempt and force of the strongest, or to him that shall first take Arms; but it has been usual for the sum not to be advanced till after the War begun.

Andrea Mauro-
ceni Hist. Ven.

XX. Leagues concluded by the *Deputies* of the *Confederates*, there sometimes falls out a difficulty who shall ratifie and declare himself first. In the League which was made between *Francis* the First, the *Pope*, and the *Princes of Italy*, the King refused to ratifie until the *Pope* and *Venetians* had ratified before him, and in that he so cunningly wrought, that he procured the *Collegues* to declare and begin the War, whilst that he treated secretly for himself, to the end he might make his Conditions with more advantage; this he declared was for fear those *Italian* Foxes should shew him the like.

XXI. Leagues made for an Enterprize succeed seldom according to the hope of the *Allies*, if the Enterprize be long; for besides that the preparations be long, the opinions divers in the pursuit, the resolutions inconstant, the interests of *Princes* or *States* in a League may change with time, or with the practice of him against whom they are in League, in withdrawing some one of them, or making him to suffer more loss than the rest; for seeing himself ill defended or succoured by his *Confederate*, and that he was in a greater danger to lose than his Companions, he then studies to retire * and to make his accord apart, as did the *Venetians* with the *Turks*, after the loss of *Cyprus*.

* If one part hath violated the League, the other may depart from it; for the several Heads of the League have every one the force of a Condition: so *Grotius* conceives l. 2. c. 13. §. 15.

XXII. The ordinary causes of the Rupture of *Leagues* are distrust and jealousy, as if one hath had conference with the Enemy, without the consent of the rest; if that which serveth for the safety of one, diminish the safety of the other, inconstancy, variety, cowardize, division, usurpation without the consent of the others.

So if he treats with the Enemy, not comprehending the other *Allies*, but as *Adherents*; as *Lewis* the Twelfth left the League of the *Venetians*, for that they had made a Truce with him, and had presumed to name him only as an *Adherent*. It was the opinion of *Bryan*, that if all the Subjects of *England* would make War with a *Confederate Prince* or *Republick* in League with the King of *England*, without the assent of the King of *England*, such a War was no breach of the League; and upon the same reason were the resolutions of the Judges in the Duke of *Norfolk's* Case, where the Question was, Whether the Lord *Herise* and other Subjects of the King of *Scots*, that without his assent had wasted and burnt divers Towns in *England*, and proclaimed Enemies, were Enemies in Law, within the *Statute* of 25 E. 3. the League being between the *English* and *Scots*, and resolved they were, and that the League remained.

XXIII. The Succours that one *Confederate* must afford another *Confederate* (according to the *Law of Leagues*) against a *Confederate*, is of great consequence: Three *Princes* Allied, the one makes War against the other, and demands succours from the third; in this case if the *Treaties* of Alliance be only for *Friendship*, it is certain he is not bound to give any succours: But if the Treaty carries an *Offensive League*, he must succour the most ancient allied by a precedent Alliance. If the precedent Alliances have been made both at one time, he must succour him that is allied in an *Offensive* and *Defensive League*: but if the League be *Offensive* and *Defensive* of either side, he ought not to succour either; but he may mediate a *Peace, and cause the difference to be judged by the *Common Allies*, which being propounded with a Declaration, that if one refuse, or having once submitted, will not yield to Judgment, he will succour the other, as the *Swede* and

Soluti fœderis culpam sustinent, non qui deserti ad alios se conferunt, sed qui quamjurati promiserant oppem re non præstant. Alibi apud eundem, si vel tantillum ex dictis pars alterutra transgredetur, rupta fore pacta. Thucyd. lib. 1. 19 E. 4. Vide Stat. 2 H. 5. c. 6. Hill. 14 Eliz. in the Duke of Norfolk's Case. 4. Inst. fol. 152.

In fidelitate feudali dicitur; Et si scivero velle te aliquem juste offendere, & generaliter vel specialiter fuero requisitus, meum tibi, sicut potero, præstabo auxilium. Orat. Demosthen. de Megalopoli.

* Nihil intercedi, quo minus Samniti populi pacis bellique liberum arbitrium sit. Liv. l. 8.

Grotius de Jure Belli ac Pacis lib. 2. cap. 15. §. 13. Vide Monmouth History of France fol. 37.

Swiss,

Swiss, upon several occasions have done; notwithstanding in point of State on such occasions they usually balance their Estate, and looking more to safety than Justice, they succour him who being enforced, may weaken the powerful, who is more to be feared; yet to unjust Wars there is no obligation; then certainly he ought to be preferred, who hath a just cause of War.

XXIV. By the *Laws of Alliances* Princes may aid particular and common Allies, if they be wronged by one of the Allies.

Equals cannot directly refuse War, nor demand Peace.

Liv. 3. Polybius in excerptis Legationum 35.

But he which is not comprehended in the Treaty of Alliance, cannot be defended against him that is allied without breach of the Alliance; therefore Mediation in such cases is the only hopes of the oppressed, which not having its effect, if the oppressed put themselves into the protection of the Mediator, they then become in the nature of his Subjects, and then that Prince is obliged to their succour and defence, even against his Allies, and this is by natural Right.

When Edward the Fourth was chased out of the Kingdom, and Henry the Sixth was set up again; yet by reason there was inserted into the same these words, *With the King and Realm*, that the League did remain perpetual. *Phil. Comines lib. 3. cap. 6. Ulpian. Leg. Jure Gentium, sect. passum. D. passis. Adde quæ Helvetiis causantur post mortem Hen. 3. apud Titianum, lib. 97. in An. 1589. Vide & insignem locum apud Camden. in Anno 1572. ubi de Fœdere antiquo Gall. & Scot.*

XXV. By the *Laws of Leagues*, though the Oath binds only the Person, yet the Promise binds the Successor; for though some do hold, that Leagues do depend upon the Oath as their Firmament, though that is not so for the most part, yet the efficacy of such Leagues rests in the promise it self, to which for Religion sake the Oath is added. Hence it is, that Promises made to a Free people are in their nature real, because the subject is a permanent matter; although the State or Republick be changed into a Monarchy, yet the League remains, for that the body, i.e. the power is still the same, though the Head be changed. And the person is inserted into the agreement, not that the agreement may be personal, but to shew with whom it is made; for if it be inserted into the League that it shall be perpetual, or that it is made for the good of the Kingdom, or with the Person and his Successors, or for a time limited, the same does most apparently demonstrate the thing to be real.

However in all Leagues which tend to Peace, though there may remain somewhat, whereby words of ambiguity

guity may arise ; yet the most pious way of interpreting, hath been to account the same rather *real*, than *personal* ; for all Leagues made for Peace or Commerce, admit of a favourable construction, *Leagues defensive have more of favour, offensive of burthen.*

XXVI. Leagues made with *Princes*, although they happen afterwards to be driven out of their Kingdoms by their Subjects, yet the League remains firm and good ; for the *Right* of the Kingdom remains with such an unfortunate Prince, notwithstanding he hath lost his Kingdom : The President, Canon, and Plenipotentiary for the Duke of *Lorraine* at the Treaty of *Nimmegen*, renewed his instances with the *French* Ambassadors, that he might obtain some moderation of the Conditions that had been stipulated for his Master ; the Emperour did the like, but without success ; however the Duke would not neglect any thing that might give the *French* King fresh Evidences of his desire to erit the Favour of his Majesty, he got Sir *Leoline Jenkins*, and the rest of the Mediators, to declare to Monsieur *Colbert*, that the Emperour had taken into his Service all the *Lorraine* Forces ; and in the publick Declaration which the Duke made at *Nimmegen*, he said, *That he had delivered all his Forces to a Prince at Peace with France, that he might make it appear to the King, that though he was expelled his own Dominion, yet he would do nothing that might give his Majesty ground to deprive him of the honour of his favour : And notwithstanding all these most submissive offers, this Unfortunate but Gallant Prince was shut out of that Famous Treaty, which put an end to a War wherein almost all the Princes of Europe were engaged. On the other hand, Leagues made with the Invader cannot be good ; for his cause being unjust, is odious : but if * the people will make him * King de facto, and invest him, the question is then out of all controversie ; for then he is become a King regnant, and by the Laws of England, if Treason be committed against his Person, and † after he is beaten out, † and the King de jure comes to his Crown, the King de jure may punish those Traytors with death.*

Quintus said to Nabis, We have made no Friendship nor Society with thee, but with Pelops the just and lawful King of the Lacedemonians.

** 11 H. 7. c. 1.*

† 4 E. 4. 1.

9 E. 4. 12.

3. Inst. fil. 7.

Ed. 4. in An.

1470.

him,

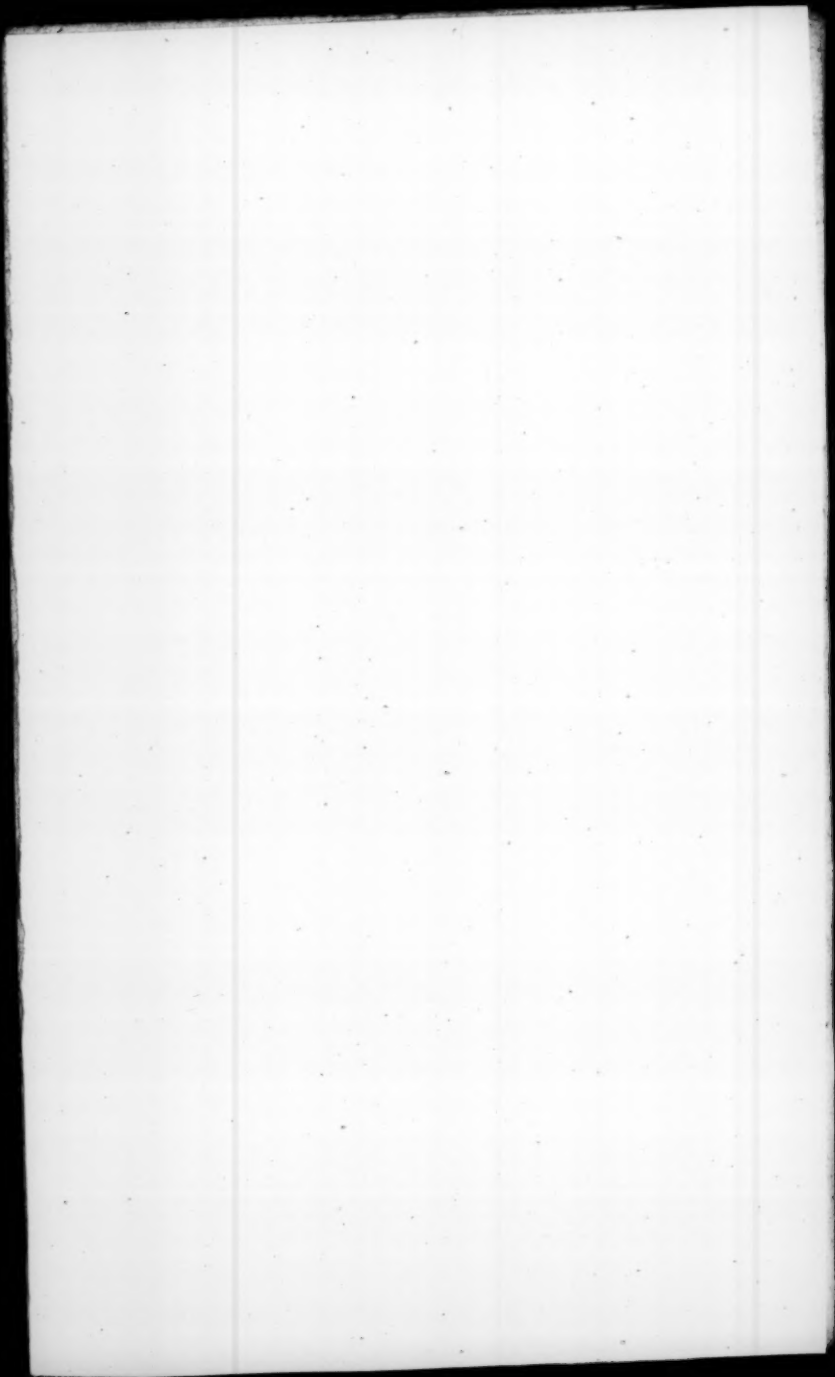
Phil. Comines
l. 3. c. 6.

*Reges qui reg-
nis exuti sunt,
cum aliis regni
bonis etiam pos-
sibilibus perdi-
derunt.*

Peter Mathews
History of
France in the
Life of Henry
the Third.

him, the Earl became Master of the Realm; the King flying for protection to his Kinsman the Duke of *Burgundy*, he kindly in his misfortunes entertained him; yet while he was in this banished estate, the Duke of *Burgundy* renewed the League with the *English*, it being agreed, that notwithstanding King *Edward's* misfortune, the League remained firm and inviolable between the Duke *Charles of Burgundy*, and the King and Realm of *England*: So that for *Edward* they should name *Henry* (who was newly taken out of the *Tower* by the Earl of *Warwick*, at his chasing out of King *Edward*.) Now the true reason that Leagues remain, and are firm, notwithstanding such a change, is, because there goes along with them a tacit condition, viz. of holding their possessions; and therefore the World wondred not, that His late Sacred Majesty having sworn a League with the King of *Spain*, expressly as he was King of *Portugal*, did notwithstanding receive two *Ambassadors* from the then new King of *Portugal*; and that without being judged either in *England* or *Spain* to have broken his former Oath and League.

The Duke of *Guise* having formed the League against *Henry* the Third, which was, in regard the King was so cold in the Profession of the *Romish Faith*, that it was in danger to be extinguish'd by the increase which he permitted of the *Reformed Religion*, especially seeing *Henry* the Fourth then King of *Navarre*, was of that Religion, and was to succeed to the Crown; wherefore by the Mediation of *Philip* the Second of *Spain*, the *Pope* qualified the Duke of *Guise*, Head of that *Catholick League*, and (which in point of Government was to set him above the King) avowed him *Protector* of the *Catholick Faith* in the Kingdom of *France*. When *Henry* the Fourth succeeded to the Crown, then this League for security of Religion was most violent, and the *Spaniard* without, hoped, by nourishing thus the division within, to carry all for himself at last. To avoid which gin, and to answer all, the King changed his Religion, and negotiated by *d' Ossat*, to be received by the *Pope* as a dutiful Son of the *Church of Rome*, demanding absolution for what was past, and making large promises of due obedience for the time to come. The King of *Spain's* interest was, that he should not be received, and thereupon he endeavoured to perswade the *Pope*, that
King



King Henry did but dissemble with him, and that under this disguise he would easiliest ruine the *Romish Religion*: notwithstanding this, the *Cardinal* obtained his Reception, Absolution and Benediction through the many promises and presents which he made to *His Holiness*, whereupon the *Spaniard's* designs were in a moment all blown over from *France*, but fell heavily upon the *United Provinces* which were sorely oppress'd, for that they apprehended the loss and ruine of their Country, and thereupon they implored assistance from King Henry, who received their Ambassadors very graciously, and gave them assurance of relief. The King of *Spain*, who wanted no good intelligence in the Court of *France*, immediately remonstrates to the *Pope*, that his former intimations concerning Henry's dissimulations did now appear in the face of all the World, and that seeing *His Holiness* had been so credulous, he knew not now whether they should be able to save the *Catholick Faith* from being subjected to the *Reformed Religion* or no: for whereas the *Hollanders* had revolted from him, only because he resolved to use the true means for the establishment of the *Romish Faith* among them, and that now he was in a fair way of reducing them (which conduced so much (by *His Holiness* his opinion) to the establishment of the *Romish Faith*) Henry had taken their party against him in that work: and that at *Paris* he had received their Ambassadors to that purpose, although he knew they were his lawful Subjects, &c.

This startled the *Pope* not a little, who charged d'Offat for having betrayed him, and put the Church in danger. This argument was as subtil on the *Spaniards* side, as changing Religion was on King Henry's; and therefore the *Cardinal* was not a little perplext, how to answer it to the advantage of his Master; as also coherently to the considerations of his former reception into the Church: But at last he replied, That *His Holiness* needed not wonder how in reason of State, those different Religions might join together for political ends, without hazard of altering Religion. Thus *David* sought protection of the *Philistines*, and *Abraham* redeemed the sinful *Sodomites*. That he took it to be upon the same ground, That *His Holiness* himself not long before, received a *Persian Ambassadour*,
H who

Vide Peter Mathews History of France in Vita Hen. 4.

In Regno diviso gens una, pro tempore quasi duas gentes habentur: And Princes are to have an eye to the Power which each Kingdom hath to afford benefit one to the other, and not to examine their Titles.

Coke 2. I. slit. fol. 155.

Lib. 2. cap. 15. §. 8.

who was so far from being an Heretick, that he never pretended to the Name of Christian: That it was a plausible argument which the King of *Spain* used, in complaining of *Henry's* receiving and avowing their Ambassadors, especially knowing at the same time that they were Rebels, and could pretend no Right or Title separate from his Crown: 'For Princes (quoth he) when Ambassadors 'are addrest to them, never inform themselves of the 'Rights and Title of those Princes from whom they are 'sent; but whether they have possession of the Force and 'Power of those Places from whence the Ambassadors are 'employed; for it would be an endless task, and require 'an infallible true History of the World (which is not to 'be made by Man) if all the Ambassadors before their 'Reception should be obliged, first to prove clearly to 'the World the just Right by which their Masters derive 'those Titles and Jurisdictions, which they assume to 'themselves.

XXVII. And as Leagues are Covenants or Agreements made by Command of the highest Powers, wherein the parties are bound over to the Divine Wrath, in case they break their Faith; it hath been a famous question, Whether they may be entred into with those that are Aliens from the true Religion, whereof by the Law of Nature there is no doubt nor difficulty; for that Law is so common to all men, that it admits not any difference of Religion; but the question is about the Law Divine, out of which it hath been discussed, not only by Divines, but famous Lawyers, as *Oldradus*, *Decianus*, *Grotius*; upon the whole they have agreed, that they may be entred into as well with Princes Infidels as Christians: and that is evidently proved; for that before the Law of *Moses* it was lawful to contract Leagues with Aliens from Religion for an inoffensive and harmless behaviour, as that of *Jacob* with *Laban*: nor did the Law of *Moses* make any change, the example of the *Egyptians* being express in the point. 'Tis true those seven Nations and other Kingdoms, as the *Amalekites*, that were destinated by Divine Sentence to be extirpated, were excepted; but Leagues of Commerce, and such as pertain to the utility of both Nations, or of either party, are by the Law permitted with the profane: So *David* and *Solomon* made League with *Hiram* King of the

the *Tyrians*; and that which is very observable in the Sacred History, of that action it is said, That the Alliance was made by *Solomon* according to the Wisdom which God had given him. 'Tis very true, the *Jews* were generally very cautious of contracting with Idolatrous Princes, and the reason was, for that they had express promises of Victory, but that was conditionally, *i. e.* if they kept the Law, which if performed, they had the less need of humane aid. But now under the Gospel such Contracts have a more favourable admittance, according to that of *Tertullian*: So long as *Israel* only was his people, God did justly command mercy towards their brethren alone; but after that he gave unto *Christ* the Nations for his inheritance, and the ends of the Earth for his possession; and that began to be paid which was promised in *Hosea*, They that were not my people shall be my people, and the Nations that had not obtained mercy shall obtain mercy; from that time *Christ* hath extended unto all the Law of Fraternal Benignity, excluding none from our compassion no more than from his Vocation; and therefore as it is no evil to do good to the prophane, so neither is it unlawful to implore their help, as *Paul* invoked the aid of *Cæsar* and the Chief Captain; so that at this day there is no intrinsecal or universal pravity; nevertheless those Alliances have their Circumstances or Rules of Government, as not to join with them but in extreme necessity, according to that of * *Thucydides*: They that are treacherously assaulted, as we are by the *Athenians*, are not to be blamed, if they seek for safety, and secure themselves by the aid not of *Greeks* only, but *Barbarians*.

de Jure Belli Romani Pontificis c. 1. Julius secundus Pontifex Turcis usus, vide Bullstroed. part. 3. fol. 28. cited in Marthe's Case, the Case of Samuel Pellagys that had been Ambassador to the States of Holland to treat with them from the Emperour of Morocco.

* Famous was the piety of *Emanuel Duke of Savoy*, who when he was able to take *Cyprus* by the aid of the *Great Turk*, refused it.

Lib. 7. cap. 3.

Horum exemplum secuti Imperatores & Reges Christiani Fœdera, aut cum non Christianis, aut cum non sane Christianis fecerunt, Constantinus cum Gothis & Vandalis, Justinianus cum Longobardis, cum Saracenis Theodosius, Honorius, &c. cum Mauris Reges Hispanie, cum Tartaris Rodolphus Habsburgensis, Adolphus de Carthagenal. 3.

C H A P. VIII.

Of Alliances unequal, and of Protection.

- I. Of Alliances unequal, in reference to the acknowledging a Superiority or Protection in another.
- II. Of Protections by a Prince or State voluntary or mercenary.
- III. Of the Conveniences of such Alliances, how considered.
- IV. Of the Duty incumbent on the protected, and the obligation in honour and justice on the Protector.
- V. Of Alliances unequal, and of the ordinary causes that may tend to a rupture of the same.
- VI. Of the causes extraordinary that may occasion the breach of such Alliances.
- VII. Of Faith and Assurance implicitly discharged by the delivering of Hostages.
- VIII. Of the differences of Leagues contracted by Princes, through force or fear, differing from Contracts private.
- IX. Of ambiguity in words, how it hath given occasion to Princes to depart from the League, and of the Reputation of Princes on such occasion preserving the Alliance.
- X. Of the firmness and assurance of Alliances, whether to be found more in Princes, or in Republics.
- XI. If one party hath violated the League, whether it be lawful for the other to depart from the same.
- XII. In the construction of Leagues, the thoughts not the words of Princes to be considered.
- XIII. Of things tacitly excepted in all Leagues and Treaties, in reference to their nullity.
- XIV. Of things favourable, things odious, and others of a mixt nature to be used in the interpreting of Leagues.

Andronicus Rhodius post Aristotelem, amicitia inter partes, hoc ait p. prium, ut potiori plus honoris, infirmiori minus auxilii deferatur. in Grot. lib. I. c. 3. §. 21. n. 2.

It is the property of friendship, twixt unequals, that the

I. **U**Nequal Alliance is that which is contracted betwixt Princes or States unequal in Honour, or in Power, with unequal conditions, the acknowledging the other not for Master or Lord, but by Honour as the more powerful, and the better qualified, and some for Protector; and these Treaties are made with those States, which take or give Pension, or which put themselves into Protection. And such was the League of * Protection propounded to Queen Elizabeth by the States General of the United Provinces, who by Joos Van Menin most humbly besought Her to accept of the Sovereignty and Supream Dominion over the said United Provinces upon certain and reasonable Conditions and Articles, &c.

stronger have more honour, and the weaker have more help: *Proculius* adds, that such a clause is inserted in the League, to signifie the one is superior in authority and dignity; for both are free, but are *sub patrocinio, non sub ditone*. *Liv. lib. 37. Cicero Offic. 2.*

* *Non sine metu in posterum, quem tunc praesens necessitas averterat. Grotius Annal. lib. 5. A. E. Metryn. lib. 13. ad An. 1585. Grimston, lib. 12. ad An. 1585.*

Tribute

Tribute is paid by the *Subject*, or by him, who, to enjoy his liberty, pays that which is agreed upon to him that hath forced him to do it. But a *Pension* is held voluntary from him that is in *Protection*, or from him that is in all other things equal to the *Treaty of Alliance* to hinder the *Pensioner*, that he join not with the *Enemy*, as the *Swiss* to the *French*, or to have aid and succours from him.

II. But that *Protection* is most true and Honourable, *Leg. non dubit;*
D. de Cap. when a Prince or *Republick* takes upon him the defence of another, *freely without reward*; though some, if not all, find it most necessary to balance Honour with profit, from this Maxim, that *A pecuniary interest obliges more to succour, than when barely obliged by Oath.*

III. Again, there seems to be a kind of *Protection* or an Alliance, which indeed is no more than a bare pecuniary retaining. Politicians have considered the subject diversly, either Absolute or Conditional; Absolute is that which is measured by the concurrence of the greatness of Forces, Treasure, Munitions, and other Military preparations: Conditional is that, the which although it be less than an absolute, yet is more fit to succour us or do us harm: in this the Neighbourhood is of very great consideration; for that a Neighbour Prince of mean Forces may more easily hurt or succour us, than a great Prince that lies far off; near succours are always sooner ready and with less charge. And this makes the Bishop of *Munster* to be in that esteem with the *States of Holland* and the other Sovereign Princes bordering on his Territory; and the reason why he is so much the more courted into assistance and friendship is, for that his Forces being at hand, if Peace be concluded, he is the more easily dispatched, whereas remote and absolute Princes their succours come often too late after the occasions to defend us, and too soon to oppress us.

IV. By the Law of *Protection*, he that is protected owes all *Respect* and *Honour* to his *Protector*, against whom if he conspire or attempt, or strays from his duty, it is lawful for the *Protector* to make *better assurance*; nay, if he pleases, to make himself *Master*: But then on the other side, the *Protectour* ought to defend and succour the protected, *The Ceneses*
having put
themselves in
the protection
of the French
King, revolted;
he thereupon
changed their Conditions into Privileges, to the end it might be his will to deprive them when he should think fit. *Vide Cardinal. Touss. P. P. Concl. 935.*

Of Leagues by Alliance unequal.

and use him well; for otherwise he may withdraw himself from the protection, and seek another.

V. In Alliances that are unequal, there are four kinds of Controversies may happen.

First, If the Subjects of a Prince or Republick, that is under the protection of another, have committed any thing *against the League*.

Secondly, If the Prince or Republick be accused.

Thirdly, If the Fellows, which are under the protection of the same Prince or Republick, contend with one another.

Fourthly, If the Subjects complain of their own Ruler.

To the first, if a fault appears, the Prince or Republick is bound either to punish the offender, or render him up to the party injured, and see or endeavour that damages may be recovered.

But one of the *Associates* in the League hath no right to apprehend or punish the Subjects of his Confederate.

To the second, the *Confederate* hath a right to compel his Confederate to stand to the League, and if he will not, to punish him, for that one may take satisfaction or revenge of him that hath offended; and this happens as well amongst those that have no Confederation at all.

To the third, as in Confederacies equal, the controversies are wont generally to be brought before an *Assembly* of the Confederates, that is to say, such as are *not concerned* in the question, or else before *Arbitrators*, or else before the *Prince* of the *Association*, as a Common Arbitrator.

So on the other hand in a *League unequal*, it is agreed for the most part, that the Controversies be debated before him who is *Superiour in the League*.

To the last, the *Confederates* have no *Cognizance*. In common Affairs out of time of Assembly, even where the *League* is equal, the Custom is for him who is chose *Chief of the League*, to have command over the Confederates, according to the Speech of the *Corinthians* in *Thucydides*, It becomes them that are *Princes of the League*, not to seek their own particular advantage, but to content themselves with an eminency above the rest, in taking care of the common Interest.

VI. Though that the breach of Faith be much practised in such affairs, yet there are few Princes found, which have

This holds as well between Leagues equal as unequal.

Grotius de Jure Belli ac Pacis

l. 1. c. 3. §. 21.

This hath the same right in Leagues that are equal. Nam

ut quis ultionem sumat ab eo qui peccavit, satis est ut ipse ei qui peccavit subditus non sit. Grot. de Jure Belli, l. 1. c. 3. §. 21.

n. 5.

But that proves not any power of commanding, for Princes do usually try their causes before Judges of their own choosing. *Ead. l. 1. c. 3. §. 21. n. 6.*

Decet eos qui Foederis Principes sunt, circa suas quidem utilitates nihil precipuum sumere; at in communibus rebus curandis comminere supra ceteros. In Orat. Corinthiorum.

have not found a *pretext*: some have pretended to be circumvented by error; others by change of Affairs have pleaded an excuse, as great wrongs or inevitable loss, and apparent danger of the ruine of their *States*, which are the causes, wherein some say, that an *Oath* is not obligatory; the condition, by reason of the Oath, being impossible or unjust; to these limitations, some hold they must not keep faith with an *Enemy of the Faith*, nor with him that hath broken his, nor with a Subject, nor with a Thief or Pirate; certainly if it be not lawful for a man in these cases to keep *Faith*, it is not lawful to give it: If it be lawful to capitulate with such men, it is necessary to hold what we promise, that is, (we presume) when the word is given by him that may give it, and that they rely upon it.

Oldrad. Conf. 1.

Gregorius, *Peperit Deo cultum mpingis negligetia*

VII. If *Hostages* are taken, he that gives them is freed from his *Faith*; for that in receiving *Hostages*, he that receives them hath relinquished from the assurance which he hath in the faith of him that gave them; so where a Captain for his Prince gives his word without *Commission*, it binds not the Prince.

VIII. Some Lawyers would judge of *Treaties* as particular *Contracts*, by which means they would stretch the Consciences of *Princes*; for, say they, that as a private man is not bound by that which he hath promised by force or fear, so it ought to take place amongst *Princes* and in *Treaties* which are made betwixt Sovereigns; but that is ridiculous, for that were in effect to banish *Faith* from all publick Negotiations; for there is no Treaty but what is usually made in *Arms* by force, or through fear to lose either Life, or Goods, or Liberty, or the State; which are causes of just fear, and may shake the most constant.

IX. Some Princes desirous to shew themselves more irreligious in these ruptures, have taken subject and occasion upon the ambiguity of some Clauses in the Treaty, or upon Equivocation, as Charles the Fifth did; or else they seek other occasions, as attempting against those whom their Allie is bound to defend, to the end that drawing him into the field, he may lay the cause of the Rupture on him.

Upon the words *Quing* and *Aug*, to retain the Landgarve of Hesse.

But Princes, who respect such *Treaties* with a pious intention of preserving them, always remain constant and firm; and though occasion may offer it self, by which they

might get *advantage* by the breach; yet when they remain durable, such respect is afterwards had to their Word and Honour, that fewer and lesser securities will be demanded of them, than one *whose Faith is doubted*.

X. But assurances in cases of this nature have been found more in *Republicks* than in *Princes*; for though *Republicks* have the same mind, and the same *intentions* as *Princes*, yet for that they move but slowly, it will cause them to stay longer in resolving. Famous is that of the *Athenians*, when *Themistocles* in his Oration told them, That he could discover a matter in which the *Athenians* would reap great advantages, but he could not tell it, for fear the discovery would take away the opportunity of attchieving it: whereupon the *Athenians* deputed *Aristides*, to whom he should communicate the secret, and with him should consult about the obtaining it: They meeting, *Themistocles* demonstrated that it was in the power of the *Athenians* to make themselves Masters of all *Greece*, for the *Grecian* Naval Army was then in their Ports and Protection; whereupon *Aristides* replied, *The same was a breach of Faith*: But it was answered, *It being for the publick, all considerations of that kind ought to be laid aside*; whereupon *Aristides* being called by the People to give Report, told them, *Themistocles's advice was exceeding profitable, but dishonest*, for which cause the people wholly refused it.

una disputatio est, licueritne per fœdus fieri: Whether *Saguntum* was assaulted by private or publick Counsel, we conceive it not to be made the question; but this, Whether it was assaulted justly or unjustly; for to our selves an account is to be given by our Citizens, whether it did it of it self, or by Commission; with you alone this is disputable, whether it were a violation of the League, or no. *Livius lib. 31.*

* *Grœ. de Jure Belli ac Pacis*, §. 15.

In fide quid sentis, non quid dixeris cogitandum. Cic. de Off. c. 1.

* *that for every offence it may not be lawful to depart from the League.*

XII. In all *Leagues*, the thoughts of *Princes* and *States* are to be considered, not what they said; yet because internal acts are not visible by themselves, it is necessary that somewhat certain should be determined, *i. e.* reduced to *Heads* or *Writings*, otherwise there would be no obligation

tion at all, for then every one might free himself by affixing on his own words what sense he pleases. Hence it is, that by the dictates of *Natural reason*, he, to whom any thing is promised, hath a right to compel the promiser to that which right *Interpretation* suggesteth, for otherwise the matter would have no end. And as the reducing of the Treaties into Writing makes the Agreements plain and obvious, so the mutual advance of the Ministers proportionably hastens the accomplishment. The Counts *Avaux* and *Servient*, being appointed for the Treaty at *Munster*, as they passed through *Holland*, they entred into a Confederacy with those States, wherein each party reciprocally did bind themselves by Articles, not only not to treat of any thing without the assent and participation of the other Collegue, but that the Treaty should be carried on so equally, as if one of the parties should see the others business advance further than his, it should be lawful for the one to desire the other to proceed no further, till his affairs were equally advanced: which Articles bounding the approaches of each other, soon hastened the end of that tedious Treaty.

Monmouth's History of France
fol. 28.

XIII. Again, in all Leagues and Treaties for Peace, there is this Exception to be supposed in the Contractors, Unless some new cause intervene, or unless it be by the default of him with whom the League and Compact is made, or Affairs continuing in the same posture and state in which they were at the time of the Contract: and that Saying of *Ulpianus* and *Pomponius* concerning private Compacts, viz. *That an agreement is not violated from which a man recedes upon a just reason and motive*; is by Interpreters extended to National Leagues betwixt Princes and States.

Qui promittit non offendere, is subintelligit exceptionem — Nisi causa superveniat, nisi culpa accesserit ejus cui promissio ista fit, Et pactis fœderis, rebus sic stantibus. Alber. Gen. iil. de Jure Belli, l. 3. c. 24.

XIV. In the Interpretation of Leagues and Truces, there ought to be a very great care had, in regard of the *Sacredness* of them; therefore in things promised or secured by such Leagues, some are favourable, some odious, some mixt, or of a middle nature. Those that are most favourable, are those whose words tend to Peace, not to War, whose footsteps leave ever behind the deep impressions of misery, devastation, and poverty, but more especially when such Leagues are made for *War Defensive* than otherwise; but those are called *odious*, which burden or

oppress

Of Leagues by Alliance unequal.

oppress one part only, or one more than the other, and likewise such as tend to matter of *Revenge* or *Punishment*, or to violate some former acts, or obligations, or the bringing in a change or innovation of what hath been constantly settled, and used before. Mixt, as where a change is propounded; but that is with the Sisters of *Moderation* and *Peace*, which are proportionably good, according as the change may be esteemed. — Therefore the Standard Rule is, That in *Leagues* and *Treaties* not odious, the words are to be taken according to the full extent and propriety of popular use; and if there be more significations, the largest is best: on the other hand we are not to recur to significations plainly improper, unless otherwise some absurdity or inutility of the agreement would follow. Again, words are to be taken ever more strictly than propriety suffers, if it be necessary for the avoiding of *inequity* or *absurdity*. But if there be not such necessity, manifest equity or utility in the restriction, we are to stay them within the narrowest bounds of propriety, unless the circumstances dissuade. On the other hand in *Leagues* or *Promises* odious, even a figurative speech is admitted to avoid the *Odium*, or burden; therefore in *Donation*, *Remission* of ones *Right*, *Dominion*, or *Property*, they are always to be construed to those things which were probably thought on, and really intended. So aids and succours promised from one part only, is to be understood to be due at the charges of him who shall acquire them.

In L. non possunt.
D. de Legibus.

Vide exemplum
in L. cum vi-
rum. C. de fidei
commissis.

Grævus lib. 1.
cap. 16. §. 12.

C H A P. IX.

Of Treaties of Truce, Neutrality, and Peace.

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|---|--|
| <p>I. Of Treaties, the various sorts.
 II. Of Rules in cases doubtful.
 III. Of Truces amounting to a Peace.
 IV. Of the advantages between Treaties of Truce and Peace.
 V. When promoted.
 VI. Whether it can prejudice the pretensions of the Principal.</p> | <p>VII. How preserved and punished by the Laws of England.
 VIII. Of Treaties of Neutrality, the various sorts.
 IX. Of the Advantages of the same.
 X. In cases of necessity where he ought to declare, and for whom.</p> |
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I. **T**reaties are either with Enemies or Friends, or with persons which desire to continue Neuters with us, or we with them.

The Treaties which are made with our Enemies are either for a time, or perpetual.

Perpetual, as the Peace that is made to compose all differences, and the War that is undertaken for Conquest, or for Reparation of injuries, or to restore the Commerce.

Treaties, which are made for a time with our Enemies, are called Truces; the which are either general, for all the States of the one or the other Prince, for all Persons, and for all sorts of Commerce: Or else they are particular, for certain Places, for certain Persons, and for the Commerce, and sometimes no further than a bare suspension of Arms.

II. When any one is bound by Alliance not to make Peace or Truce, without the consent of his Allie, and whose agreement seems doubtful, they add in the Treaty, that it shall take place for all those the Contractors shall name, and they set down no prefixed time, but that it shall continue till he refuse, and some reasonable time ascertained after; as that which was made betwixt Charles the Eighth and the King of Spain.

In the Truce that was made between Edw. the fourth and Lewis the Eleventh, there was like provision made for

Charles Duke of Burgundy, but he refused, and concluded a Peace for himself apart, being angry with Edward the fourth for making the same. *Phil. Comin. lib. 4. cap. 40.* So Lewis the Eleventh concluded a Truce for nine years with Edward the fourth when he had invaded France. *Phil. Comin. lib. 4. cap. 8.*

III. Some-

Of Treaties of Truce and Neutrality.

III. Sometimes a *general Truce* holds the place of *Peace*, as that of a hundred years. Such Truces are commonly made betwixt Princes that are *equal in Power*, as that betwixt *Spain* and *Portugal*, and will not *quit* any thing of their *Rights* by Peace; and yet desire to live quietly in the State wherein they are, *satisfying by this Medium the Point of Honour*.

IV. *Treaties of Truce* are many times less subject to *Rupture* than a *Peace*, which is made *perpetual*; for Princes or States that find themselves aggrieved with a Treaty that is perpetual, seek out plausible reasons to forsake it, seeing the grievances cannot be otherwise repaired; but if the time be limited and expired, they may pursue that which they think *ought to be granted*, and the other may oppose; and if they have a desire to continue the *Truce*, there is nothing so easie as to renew it. Hence it is become a *Maxime* in State, That seeing Treaties are grounded on the *Interests of Princes which change with the time*, it is *necessary to change and settle them at the end of the time*, or to *break them off*: for it is in vain to trust to a bare Friendship.

*Tis true, the Swedes and the other Confederates with France were for a Peace, and the Marquess of Castle-Roderigo then offered a Blank unto the *Hollanders* which they might treat of at home.

* *Monmouth's History of France*, fol. 28.

V. A *Truce* is likewise made to advance a *Peace*, and to treat it; and such was the Truce of the *Hollanders* propounded at the Treaty of *Munster*, who refused absolutely to listen to any more than a Truce; and the reason that they then gave was, that their Commonwealth was to be maintained by Arms, and that by admitting a Peace, the same might be a means to reduce it to weakness, which would in the end tend to the destruction of that State; nay, they offered the Truce on Terms, that if * *France* should enter thereinto, she should oblige her self upon any breach to reassume War, and that Treaty of Truce was continued, which not long after was converted into a perpetual Peace.

Again, *Truces* are sometimes promoted for the more honest discharge of a *League*, which is made with some other Prince, whom they have accustomed to comprehend therein: so as a Peace following it, or a Truce not being accepted by him, they take occasion to leave the League, *it being not his fault that leaves it*, that the War was not ended.

VI. And

VI. And although it seems that a *Truce* cannot by its condition prejudice the *pretension* in the *Principal*; yet it is most certain, that if he which is chased out of a contentions State, consents that during the *Truce* the *Commerce* shall be forbidden to his Subjects, he doth wholly stop the gate, as * *Lewis* the Twelfth did in the *Truce* which he made with *Gonsalve* after the Conquest of the Realm of *Naples*.

* For the Right remains with him, however he hath lost the possession. *Grotius de Jur. Bell. ac Pacis*, lib. 2. cap. 16. §. 18.

VII. In *England* by the Statute of 2 *H. 5. cap. 6.* Robbery, Spoiling, breaking of *Truces* and *Safe-Conducts* by any of the Kings Liege People and Subjects within *England*, *Ireland*, and *Wales*, or upon the main Sea, was adjudged and determined to be High Treason; but this branch concerning High Treason is repealed by the Statute of 20 *H. 6. cap. 11.* But by the said *Act* of 2 *H. 5.* for the better observation of *Truces* and *Safe-Conducts*, *Conservator Induciarum & salvorum Regis conductuum*, was raised and appointed in every Port of the Sea by Letters Patents, his Office was to inquire of all offences done against the Kings *Truces* and *Safe-Conducts* upon the main Sea (out of the Counties and out of the Liberties of *Cinque Ports*) as *Admirals* of custom were used to do. Sir *John Trebiel* was committed to the *Tower* for taking a *French Ship*, and being brought into *Parliament*, did there justify the same; but at last confessed his fault, and begged the Kings Pardon †. Generally all Leagues and *Safe-Conducts* are, or ought to be of *Record*, that is, they ought to be Inrolled in the *Chancery*, to the end the Subject may know who are in Amity with the King, and who not; who be Enemies, and can have no Action here, and who in League, and may have Actions personal here.

2 *H. 5. cap. 6.*

20 *H. 6. cap. 11.*

† And at the request of the Lords and Commons was pardoned, he making satisfaction for the loss. 11 *H. 4. ad Parliam. tent. quinden. Hill. Vide Cotton Abridgment.*

19 *E. 4. 6. B.*
18 *H. 6. cap. 4.*
20 *H. 6. cap. 1.*

Sometimes they have been inrolled in the *Wardrobe*, as being matters of State. 19 *E. 4. 6. B.*

Note, In all *Treaties*, the power of the one party, and the other, ought to be equal; nor are they to be held firm till ratified. Maxime.

Before the Statute, when any breach of *Truces* or Leagues happened, or was occasioned by the misdemeanours of any of the King of *Englands* Subjects, there did usually issue forth Commissions under the *Great Seal of England*,
Rott. *Scotia de An. 10 E. 3. m. 35. intus, de puniendo illos qui contra fir-*
mam Trenga hominibus de Scotia concessa deliquerint.

Of Treaties of Truce and Neutrality.

to inquire of the Infringers of the same, and to punish and award satisfaction to the injured.

VIII. *Princes* who neither love nor hate any thing abso-
lutely, seem generally inclined to *Neutrality*, and in that
govern themselves in their Friendships according to their
Interests; and *Reason of State*, in effect is no other but
Reason of Interest.

Neutrality may be of two sorts; the one with *Alliance*
with either part, the other without *Alliance*, or so much as
the least tie to the one or other, which is that which
properly may be called *Neutrality*.

The first is governed by the *Treaty of Neutrality*, the
latter by the *Discretion of the Neuter Prince*, whose car-
riage ought always to be such, as that he may not give
the least glimpse of inclining more to one than to ano-
ther.

IX. The advantages of *Neutrality* are, that the Neu-
ter Prince or Republick is honoured and respected of
both Parties, and by the fear of his declaring against one
of them, he remains Arbitrator of others, and Master of
himself.

And as a Neuter neither purchases Friends, nor frees
himself from Enemies; so commonly he proves a prey to
the Victor: hence it is held more advantage to hazard in
a Conquest with a Companion, than to remain in a state
wherein he is in all probability of being ruined by the one or
the other.

But Princes that are powerful, have used generally to
preserve a *Neutrality*; for whilst petty Princes and States
ruine themselves by War, he fortifies himself with means,
and in the end, may make himself Judge of their Diffe-
rences.

On the other hand it hath been conceived, that Repub-
licks that are weak, what part soever they take, it will
be dangerous to them, especially if they are in the midst
of two more powerful States than themselves; but expe-
rience hath made it appear to the contrary, that *Neutra-
lity* is more beneficial to a weak Prince or Republick, so
that they that are at War be not barbarous or inhumane.
For although a *Neutrality* does not please either party,
yet in effect it wrongs no man; and as he doth not serve,
so he does not hurt: besides, his declaration is reserved till
the

Much practi-
sed by the
Princes of the
Empire and
petty States.

the issue of the War, by which means he is not obliged, by siding with either party, to gain or lose by the War.

X. But if the Neuter be prest by necessity to declare himself, he must do it for the most powerful of the two parties, following that *Roman Maxim*, *That either they must make themselves the strongest, or be a friend to the strongest*: So they of *Strauburg* * declared for the Empire against the French. On the other hand, if the Neuter sees, that joining to the weaker, will balance the power of the stronger, and by this counterpoise reduce them to reason; the same hath been generally followed upon the Maxim, *That the safety of States consists chiefly in an equal counterpoise of the one, and the other; for as the greatness and opulency of a Prince draws after it the ruine of their Neighbours, it is wisdom to prevent it.*

* Anno 1674.
Consul Quintus
ad Achæos, quod
optimum esse
dicant non in-
terponi vos bel-
lo: imo nihil
tam alienum re-
bus vestris est:
Quippe sine gra-
tia, ne digni-

tate premium victoris eritis. Lucius lib. 35. Scripta Ammirat. disc. polit. l. 18. disc. polit.

CHAP. X.

Of the Immunities and Priviledges of Ambassadors and other publick Ministers of State.

- I. Of the Function of Ambassadors and Agents generally considered.
- II. Of the difference between Ordinary and Extraordinary.
- III. Of the Qualifications and matters requisite to be in such.
- IV. Whether any but Sovereign Princes and States may qualifie such, and who may not.
- V. Of the Right of Ambassadors, how secured by the Laws Divine and of Nations.
- VI. Of precaution, whether the same may be given to such not to come, and attempting against such: how to be dealt with, and of the punishment of those that shall violate them by the Laws of England.
- VII. How Princes and States may govern themselves in reference to their reception or refusal.
- VIII. Whether Ambassadors may be subjected to punishment when they offend against the Laws of Nations.
- IX. Of proceeding against them by Princes and Republicks at this day according to the Laws of Nations.
- X. Whether priviledged in that State or Country through which they pass without leave, and of the various proceedings against them by several Princes and States, illustrated in precedents and examples.
- XI. Of proceeding against them according to the Laws of England.
- XII. Where they forfeit their priviledge according to the Laws of England in things Capital.
- XIII. Where preserved in matters ordinary not malum in se.
- XIV. The Office of a publick Minister,

- ster, what it includes in matters Civil for the King and Nation whom they represent.
- XV. Whether the House of an Ambassador can be a Sanctuary to offenders, or that he may exercise Royal Jurisdiction over his own Domesticks and Vassals.
- XVI. Whether the Goods of an Ambassador are subject to seizure for debts contracted by himself.
- XVII. Outrages committed by Ambassadors, where a forfeiture of their privilege.
- XVIII. Of punishment on those that shall offer violence to their persons.
- XIX. Observations touching the Immunities and Government of the publick Ministers of Venice.
- XX. How introduced by the Laws of Nations.
- XXI. Wars whether just for violation, done to publick Ministers.

Coke 4. Instit
fol. 153.

Agents are generally used when there is some suspicion

that the Ambassador will not be honoured as he should be; therefore the French Kings of late years have no Ambassadors in the Emperours Court, but Agents, because of the competition for precedence betwixt him and Spain.

I. **A**N Ambassador and Agent is the same thing, if we consider only the Function of their Charges: only in this they differ; an Agent hath charge to represent the Affairs only, but an Ambassador ought to represent the Greatness of his Master, and of his Affairs.

II. Ambassadors are in two capacities, either Ordinary or Extraordinary: The ordinary or Lieger Ambassadors are those who are commanded to reside in the place whither sent, unless they receive Letters of Revocation; and as the time of their return is indefinite, so their business is uncertain, arising out of emergent occasions, and commonly the protection and affairs of the Merchants is their greatest care. The Extraordinary or *pro tempore* are those that are employed upon some particular great Affairs, or Condolements or Congratulations, or for Overtures of Marriage, &c. Their Equipage is generally very magnificent and illustrious, and they may return without requesting of leave, unless there be a restraining Clause in their Commission.

III. An Ambassador or Agent ought to be conversant in all sorts of History, reading with judgment and weighing all the circumstances of action which are there represented, by which he will be qualified to know (but especially of that Country whither he is sent)

1. The Establishment of Estates.
2. The Rights of Limits.

3. The

3. The Genealogies of Princes.
4. The Pretensions of Kings upon the Estates of others.
5. Their Forces, Means, Alliances, and manner of living.

Personally he must be

1. Resolute and courageous in that which he hath wisely deliberated.
2. Secret in Affairs of Importance.
3. Discreet in his Speech.
4. No Detractor or Speaker evil of any King or State, but more especially of him or them with whom he remains.
5. One that will speak freely of his Masters Pretensions, if there be a question to maintain them.

IV. By the Laws of Nations none under the degree of a Sovereign Prince can nominate or send any in that quality; nor can any Subject send or receive any Ambassador, be he never so great; if a Viceroy doth it, it is no less than High Treason: and so it was declared when the *Scots*, *inconsulto Principe*, sent *Lowden* and others in quality of private clancular Commissioners to treat with the French King *Lewis* the Thirteenth in the name of the whole Nation for assistance, the King would not admit or hear them. So did Queen *Elizabeth* when *Christopher Assonville* came into *England* in quality of a Minister of State, sent from the Duke of *Alva* then Governour of *Flanders*, she refused to admit him, he not having any Commission or Credentials from the King of *Spain*. 'Tis true the Electors and Princes of *Germany* have obtained the Priviledge of sending and the Reception of Ambassadors, * but that is limited only to matters touching their own Territories, and not the state of the Empire; and so likewise the *Hans* Towns may do the same, for they claim the like privilege, they being free Imperial Cities, and partake of the same Regalia's either by Prescription or by Grants from former Emperours, whose necessities enforced them to part with such Royal flowers of the Empire; and generally they † send for their Ambassadors always two persons, one of great Birth, and that hath been a Souldier to maintain decency, and the other a Doctour or Lawyer to regulate Affairs with Learning and by the Pen.

sed tantum sui Territorii ratione; eo enim ipsis intuitu tantum datum, ultra igitur terminis non est procedendum, fieret enim alias prejudicium Imperatori, &c. Kirknerus S. 25. Memorable was that of the *Switzers*, who sent a Message to the French King, that he should not send them an Ambassador with store of words, but a Treasurer with plenty of Money. † *Monmouth's History of France*, fol. 27, 28.

The Trumpe-
ter that
brought the
Letters from
the Maid of
Orleans to the
Earl of *Suffolk*
was burnt, and
the reason of
that was, be-
cause he came
from no lawful
Prince, nor
one Commis-
sionated, or ca-
pable of send-
ing a Trumpe-
ter. *Grimmons*
History of
France fol. 326.
* That the *Ger-*
man Princes
may have such
a Prerogative,
but it is *secun-*
dariotantum
jure. Et qui *jus*
mittendorum
Legatorum *secun-*
dariotantum
jure habent, *mit-*
tuntur *Legationi*
de Rebus univer-
sum concernen-
tibus Imperium.

V. The right of Embassadors is secured both by the safeguard of men, and also by the protection of the *Law Divine*; therefore to violate this is not only *unjust*, but *impious* too: and as *Protection* is given to the *Legates* of *Supreme Rulers* by the *Laws of Nations*, so by the *Civil Law* there is a *Protection* likewise for *Provincial Legates*, *Heralds*, and *Consuls*. This *Right of Legation* was originally provided, saith *Livy*, for a *Foreigner*, not a *Citizen*; yet in *Civil Wars*, *Necessity* sometimes makes place for this *Right* besides the *Rule*, as when the *People* are so divided into *equal parts*, that it is doubtful on which side the *Right of Empire* lyeth, as that unhappy Spot of *Flanders*; or when the *Right* being much controverted, two contend for the *Succession* to the *Throne*; for in this case one Nation is reckoned as two, and so was the State of *England*, when the *House of York* and *Lancaster* contended for the *Crown*, properly then called *Commissioners*; nay this *Right of Legation* hath been so preserved, that the very *Messengers* of *Rebels* have been protected, as were those of *Holland* by *Philip* of *Spain*. So great a *Respect* have Nations had in all times to such Men, that even * *Traitors*, nay *Pirates* and *Robbers*, who make not a *Society*, nor have any *Protection* by the *Law of Nations*, and with whom neither *Faith* nor *Oath* (as some conceive) may be kept, *Faith* being given them, obtain the *Right of Legation*, as once the *Fugitives* in the *Pyrenean Forest* did.

Rings conquered in a solemn War, and deprived of their Kingdom with other Royalties, lose the right of Legation. P. Amilius detained the Heralds of Persius, whom he conquered.

* *C. P. le a Traitor fled to Rome, the Pope sent him Ambassador to the French King, of whom the King of England demands his Subject, j. d non prevailuit. Coke Instit. 3. fol. 153.*

Rot. Pat. 3 R. 2. num. 18.

VI. *Ambassadors* may by a *precaution* be warned not to come; if they dare, they shall be taken for *Enemies*; but once admitted even with *Enemies* in *Arms*, much more with *Enemies* not in actual *Hostility*, have the *protection* and *safeguard* of the *Laws of Nations*; and therefore their *Quality* being admitted by *Safe-conduct*, they are to be preserved as *Princes*; and so it was declared in *Parliament*, where the killing of *John Imperial*, *Embassador* from the States of *Genoa*, was *High Treason*, *Crimen lae Majestatis*

† So likewise of *A. de Walton*, the Kings Ambassadour, *Legatus ejus* *Nuncium Domini Regis missum ad mandatum Regis exequentem*, who was murdered by one *John Hill*, which offence *vice fungitur a quo destinatur*, was adjudged High Treason, and accordingly he was drawn, hang'd, and beheaded. *Et honorandus est sicut ille cuius vicem gerit*,

Et Legatos violare, contra jus Gentium est. 22. Aff. re pl. 49. Note, this was three years before the making of the Statute of 25 E. 3. *quare* if such a *Prorex* is within the Statute at this day.

And by the *Julian Law*, he that violates Ambassadors is guilty of publick violence, that is of prostituted Faith of publick Authority, and of a breach of the Laws of Nations: and by the *Pontifical Law* it is no less than a *Piacle*, and to be interdicted from the benefit of holy things. *Qui violavit Legatum, Lege Julia de vi publica tenetur.* *Philomela* sung a fatal *Requiem* for the bloody entertainment which she gave the Ambassadors of *Frederick Barbarossa*, the Emperour having sent them to treat in order to Peace; but they instead of that avowed the action of those that murdered his Ambassadors: The offended Emperour having taken the City, razed it to the ground, and executed all the people therein as Rebels and Traitors against the Laws of Nations. *Fuller's Holy War, l. 3. c. 43*

VII. On the other hand, Embassadors may not always be received, though always they ought not to be rejected without cause; for there may be cause from him from whom they come, as the *Roman Senate* would not admit of the Embassage of the *Carthaginian*, whose Army was then in *Italy*; the King of *Spain*, those of *Holland*, and the then *Pope*; the Embassador of *Henry the Second* after the Murder of *Becket* Archbishop of *Canterbury*: so likewise from the very persons that are sent, as *Theodorus* the *Atheist*, whom *Lyfimachus* would not give Audience to, and *Mr. Oliver*, *Lewis the Eleventh's* Barber, whom they of *Gaunt* refused: Yet *Mathews Palmerius*, an Apothecary of *Florence*, had better Fortune than the *French Barber*; for he being sent in Quality of Embassador to *Alphonso* King of *Naples*, and having acquitted himself elegantly, and with much Generosity at his first Audience, the King having information that he was an Apothecary, said, *Se tali sono gli speciali di Fierenze, quali debbono essere gli Medici? If the Apothecaries of Florence are such, what shall we think of their Physicians?* *Camden 1571: quest. ibi proposita. 4. Daniel's History of Henry 2. Carolus quintus Imper. Gallia, Venetorum, Et Florentinorum ad bellum sibi indicendum missos deduci jussit in locum qui a comitatu suo abesset, triginta miliar. erea. Guic. l. 18: Bellarius l. 3.*

So likewise where the cause of sending is suspected, in reference

As my Lord
Bacon observes
in the Life of
that Prince.

* *Card. Arnold.*
Offat in his
353. Epistle.
Coke 4. Instit.
fol. 153.

Menander Pro-
teflor Justino
Imper. Avaro-
rum Legatos
contra jus Lega-
tionum in vin-
culis habuit,
Cothmann.

Resp. 32. r. 29.
Coke Instit. 4.
153. 2 H. 5.
cap. 6. 20 H. 6.
cap. 11.

* *Quaquam vi-*
si sunt commissi-
se ut hostium lo-
co essent, jus ta-
men Gentium
valuit.

† *Fit reus magis*
ex aquo loquoque
quam ex jure
Gent. Bomil-
car comes ei
qui Romam fide
publica venerat.

An Enemy is bound to whom they are sent, but their Priviledge obliges not those through whose bounds they pass without leave; for if they go to, or come from their Enemies, or make any hostile attempt, they may be slain. *Liv. lib. 26.*

reference to disturb the People; or with intentions rather to sow Sedition, than to conclude a Peace (if such be their Errand) or not honourable, or unseasonable. As for those assiduous Legations which are now in use, they may with very good right be rejected; for the no-necessity of them appears by the ancient Custom whereto they are unknown, which made *Henry the Seventh* admit of none.

The *Venetian* having admitted *Henry the Fourth* of *France* his Ambassador, yet they interdicted him * to come with the other Ambassadors to the *Chapel*, till the King was reconciled to the *Church of Rome*.

VIII. By the Laws of Nations, only unjust force is kept from the Bodies of Ambassadors; for if the Laws of Nations be broken by him, he is subject to punishment: yet the opinion of Nations and Men Eminent for Wisdom, have been doubtful in this point, and Presidents on both sides have been avouched; One which seems to refute that position of punishing such Ministers of State: The Ambassadors of *Tarquin*, who had committed Treason at *Rome*, and as * *Livy* observes, were in the State of Enemies; yet the *Right of Nations* (as he calls it) prevailed so far as to preserve them, though in a case of Hostility. On the other hand, † *Salust* observes, that *Bomilcar*, one of the *Carthaginian* Ambassadors, who came to *Rome* on the Publick Faith, was adjudged guilty, rather (saith he) by the *Rules of Equity*, than by the *Laws of Nations*: Equity, that is the meer *Law of Nature*, suffers punishment to be exacted where there is found a Delinquent, but the *Laws of Nations* except the Persons of *Ambassadors*; for certainly their security out-weighs the profit arising from punishment, which may be inflicted by him that hath sent him (if he be willing) if unwilling, it may be exacted of him as an approver of the crime.

IX. Again, as Ambassadors are not to render a reason of their Actions to any other, but to him by whom they are sent; so it is impossible, by reason of various Interests and other Secrets of State, which pass through their hands, but somewhat may be said, which bears a show or

Grotius de Jure
Belli ac Pacis,
l. 2. c. 18. §. 4.
n. 4, & 5.

or face of crime; (which perhaps may prove otherwise) yet the examining and tracing of the truth may be of a dangerous consequence; and therefore if the offence be such as may be contemned, it is usually to be dissembled or connived at, or else the Ambassador be commanded to depart the *Realm*; and if the crime be cruel, and publickly mischievous, the Ambassador may be sent home with *Letters of Request* to his Master to inflict punishment according to the offence: So likewise in the precaution of a great mischief, especially publick, (if there be no other remedy) Ambassadors may be apprehended and executed; and if they oppose by force of Arms, they may be slain.

*Senatus faciem
secum attulerat
auctoritatem
Reip. M. Tull. 3.*

*Coke Instit. 4.
fol. 152.*

*Sic Carolus
quintus Legato
Ducis Mediolanensis
ut subdi-*

*ti sui imperavit, ne à Comitatu suo abscederet, Guicciard. in dist. jam loc. Vide Camdens
Elix. Anno 1571, 1584.*

In the Bishop of *Ross's* Case, *An. 13 Eliz.* the question was, *An Legatus qui rebellionem contra Principem ad quem legatus concitat, Legati privilegiis gaudeat, & non ut hostis pœnis subjaceat*; and it was resolved, That he had lost the Priviledge of an Ambassador, and was subject to punishment; nor can Ambassadors be defended by the Law of Nations, when they commit any thing against the State or Person of the Prince with whom they reside.

*Hill. 13 Eliz.
Bishop of Ross's
Case. Co. 4. Inst.
fol. 152.*

X. And why Ambassadors are in safety in their Enemies Countries, and are to be spared when they commit offences, is not so much for their own or Masters sake, but because without them there will never be an end of Hostility nor Peace after War: neither is the Name or Person of an Ambassador so inviolable, either in Peace or in time of War, but there may be both a convenient time and a good occasion to punish them, and this standing with the Laws of Nations, as may appear by these following Examples.

*Thucyd. lib. 2.
Appian. de Bello
Illyrico.
Siculi Atheniensium Socii
Legatos Syracusanorum missos
ad Civitates alias cepere. Thucyd. lib. 2.*

1. The Law does not pertain to them through whose bounds Ambassadors pass without leave; for if they go to their Enemies, or come from their Enemies, or make any hostile attempt, they may be slain: So the Athenians did to the Ambassadors between the Persians and Spartans, the Illyrians to the Ambassadors between the Effeans and Romans.

I 3

2. The

*De Gallorum
ad Turcam lega-
tis, quos in Pado
Hispani cepere
occiderunt, vide
Judicia Perusæ,
lib. 11.
Camden Eliz.
Anno 1571.*

*History of the
Republick of
Venice, fol. 450,
451.*

*Goodwyn de Lez.
Antiq. Rom.*

*Aſſa Trident.
Concilii.*

*Pompon. Leg.
ult. D. de Lega-
tis.*

*Benedict. in Vi-
ta Hen. 2.*

2. The Emperour *Charles* the Fifth, advertised of the League made against him, would not dismiss the Ambassadors of *France*, *England* and *Venice*, till his own were in safety, but he set Guards upon those of *France*, *Venice*, and *Florence*, causing them to be conducted thirty Miles from his Court, with a Prohibition not to speak to them, nor for them to write. As to him of *Milan*, as his Subject, he was enjoyned not to part from Court; but as for him of *England* there was no alteration.

3. The *Venetians* having destroyed some of the *Coraïres*, *Amurath* commanded *Luigi Contarini*, then *Bailio* of *Venice*, to be imprisoned.

4. The *Signiory of Venice* understanding that certain Traitors, who had revealed their *Secrets* to the *Turk*, were fled for protection into the House of the *French* Ambassador at *Venice*, sent Officers to search the Ambassador's House; but the Ambassador refusing them entrance, the *Senate* commanded certain Cannon to be brought out of the *Arsenal* to beat down his House, which when he saw planted, he surrendered up the Traitors.

5. The Ambassadors of *Targin*, *Morte affligendos Romani non judicarunt, & quanquam visi sunt ut hostium loco essent, jus Gentium tamen valuit.*

6. The *State of Rome*, though in case of most Capital Crimes, exempted the *Tribunes* of the People from question during the Year of Office.

7. The Ambassadors of the *Protestants* at the *Council of Trent*, divulging there the *Doctrine* of the Church, contrary to a *Decree* there, whereby it was enacted a crime equivalent to *Treason*, yet stood they protected from any punishment.

It is generally consented by all the *Civilians*, That *Legis de jure Gentium indictum est, & eorum corpora salva sint, propter necessitatem Legationis, ac ne confundant jura commercii inter Principes.*

8. *Viva*, the *Pope's* *Legate*, was restrained by *Henry* the Second for exercising a Power within his Realm, not allowed or admitted of by the King, in disquiet of the State, and forced to swear not to act any thing in *prejudicium Regis vel Regni*.

On the other hand, it hath been answered, That they are by the *Laws of Nations* exempted from *Regal Tryal*, all

all actions of one so qualified, being made the acts of his Master, or of those whom he represents, until he or they disavow; and injuries of one *Absolute Prince* or *State* to another is *factum hostilitatis*, and not *Treason*; the immunity of whom *Civilians* collect as they do the rest of their grounds from the practice of the *Roman State*, deducing their arguments from these examples.

9. The *Fabii* Ambassadors from *Rome* were returned safe from the *Chades*, with demand of Justice against them only, although they had been taken bearing Arms with the *Etrurians* their Enemies.

Colloquium Machiav. l. 2. c. 28.

Liv. 2. Dec.

10. King *Edward* the Second of *England*, sent amongst others a *French* Gentleman Ambassador into *France*; the King upon this arraigned him as a Traitor, for serving the King of *England* as Ambassador, who was his Enemy (but the Queen procured his pardon.)

Sir Robert Cottons Posthumus.

11. *Henry* the Third did the like to one of the *Pope's* Ambassadors, his *Colleague* flying the Realm secretly, fearing, *timens pelli sui*, as the Records have it. *Edward* the First restrained another of the *Pope's* turbulent Ambassadors, till he had (as his Progenitors had) informed the *Pope* of the fault of his *Minister*, and received satisfaction for the wrongs.

Rott. Scaccar. Westmin. Claus. Edw. primi.

12. *Henry* the Eighth commanded a *French* Ambassador to depart presently out of the Realm, because he was the professed Enemy of the See of *Rome*.

13. *Lewis de Prat*, Ambassador for *Charles* the Fifth, was commanded to his House, for accusing falsely *Cardinal Woolsey* to have practised a breach between *Henry* the Eighth and his Master, to make up the amity with the *French* King.

Lor! Herbert's History Vita Hen. 8. Anno 1523.

14. *Sir Michael Throgmorton* by *Charles* the Ninth of *France* was so served, for being too busie with the Prince of *Conde's* Faction.

15. The *Pope's* Ambassador at *Paris* was arraigned for practising certain Treasons in *France* against the King in the Parliament of *Paris*, and was there found guilty and committed to Prison.

16. Doctour *Man* then Ambassador was taken from his house at *Madrid* in *Spain*, and put under a Guard to a straiter Lodging for breeding a Scandal (as the *Conde Teri* said) in using by Warrant of his place, the Religion of

Camden's History Vita Q. Eliz. An. 1557.

his Country, although he alledged the like permitted to *Guzman de Silva* their Embassadour in *England*, and to the *Turk* no less than in *Spain*.

Guicciard. lib.

18.

17. *Francis* the First, King of *France*, sent *Cesar Tregosus* and *Anthony Rincone*, Embassadours to the *Turk*, they were surpris'd by the Armies of *Charles* the Fifth on the *River Po* in *Italy*, and were put to death; the *French* King complained that they were wrongfully murdered, but the *Emperour* justified their death; for that the one was a *Genois*, and the other a *Milanois*, and his Subjects, feared not to serve the King his Enemy.

*Lord Herbert's
History of H. 8.*

18. *Henry* the Eighth being in League with the *French*, and at enmity with the *Pope*, who was in League with the *French* King, and who had sent *Cardinal Pool* to the *French* King, of whom King *Henry* demanded the *Cardinal*, being his Subject, and attainted of Treason, *sed non prevaluit*.

19. *Samuel Pelagii*, a Subject to the King of *Morocco*, pretended that he was an Ambassador sent unto the *States General* of the *United Provinces*; he came to them, and accordingly they treated with him. afterwards he departed; and being upon the Sea, he there took and spoiled a *Spanish* Ship; and then came into *England*; the *Spanish* Embassadour here having received intelligence of the spoliatio, caused his Person to be seized upon, intending to proceed against him as a Pirate, and imprisoned him, and upon conference with the *Lord Coke*, *Dordridge*, and other Judges and *Civilians*, they declared their opinions, That the Caption of the *Spaniards* Goods by the *Morocco* Embassadour, is not in Judgment of Law a *Piracy*, in regard it was apparent that the King of *Spain* and the King of *Morocco* are Enemies, and the same was done in open *Hostility*; and therefore in Judgment of Law could not be called *Spoliatio, sed legalis Captio*; and a Case out of 2 R. 3. fol. 2. was vouched, where a *Spanish* Merchant before the King and his Council, in *Camera Scaccarii*, brought a Bill against divers *English-Men*, therein setting forth *quod depre datum & spoliatus fuit* upon the Sea, *juxta partes Britannia, per quendam Virum bellicosum de Britannia de quadam Navi*, and of divers Merchandises therein, which were brought into *England*, and came into the hands of divers *English-Men*, naming them, and so had process

process against them, who came in, and pleaded, That in regard this depredation was done by a Stranger, and not by the Subjects of the King, therefore they ought not to be punished; in regard that the *Statute* of 31 H. 6. Cap. 4. gives restitution by the Chancellor, in *Cancellaria sibi vocato uno Iudice, de uno Banco vel altero*; and by the *Statute* of 27 Ed. 3. Cap. 13. that the restitution may be made in such a case upon proof made, by the Chancellor himself without any Judge; and upon that Case it was resolved, *Quod quisquis extraneus, &c.* who brings his Bill upon this *Statute* to have restitution, *debet probare quod tempore captivonis fuit de amicitia Domini Regis*; and also *quod ipse qui eum ceperit & spoliavit, fuit etiam sub obedientia Regis, vel de amicitia Domini Regis, sive Principis querentis tempore spoliationis, & non inimicus Domini Regis sive Principis querentis, quia si fuerit inimicus, & sic ceperit bona, tunc non fuit spoliatio, nec depredatio, sed legalis captio, prout quilibet inimicus capit super unum & alterum*: the Judgment of which Case was held to be Law, and thereupon the Judges delivered their opinions, that the *Morocco* Embassadour could not be proceeded against as a Pirate.

Bulstrode 3. part.
fol. 28. cited in
Marsh's Case.

20. In the time of Philip the Second of Spain, the Venetian Embassadour in Madrid protecting one Bodovario, a Venetian, an offender, that fled into his house, and denying the Corridor or Justice to enter his house, where the Embassadour stood armed to withstand them; upon complaint made, the Embassadour was removed unto another house, till they had searched and found the offender; then conducting back the Embassadour with all due respect, a Guard was set upon his house to stay the fury of the enraged people; the Embassadour complaining to the King, he remitted it to the Supreme Council: they justified the proceedings, condemning Bodovario to lose his head, and other the Embassadours Servants to the Gallies, all which the King turned to Banishment; and to satisfy the most Serene Republick, sent the whole process to Inego de Mendoza his Embassadour at Venice, declaring by a publick Ordinance unto that State, and all other Princes, That in case his Ambassadors should commit any offence unworthily, and disagreeing to their qualities and professions of Ambassadors, they should not enjoy the Priviledge of those Officers, but he would refer them to be judged by the Laws of

Sir Hen. Wootton's
State of Chri-
stendom, fol.
211.

that

that Prince or State where they then resided, and where they had injured. It was a great and a noble Saying.

Vide Sir Robert
Cotton's post-
hum. and the
Proposition to
King James.

21. In the Year 1568. *Don Gubernon d'Espes* was ordered to keep his House in London, for sending scandalous Letters to the Duke de Alva unsealed, and in 1586. *Don Bernardino de Mendoza*, was restrained first, and after commanded away.

XI. The manner of proceeding against them, according to the practice in England, hath been conceived necessary to be, that some of the Chief Secretaries of State were sent to the Ambassadors, and by way of advice, that understanding that the Common People having received notice of, &c. "And that they cannot but conceive a just fear of uncivil carriage towards their Excellencies or their Followers, if any the least incitement should arise, and therefore for quiet of the State, and securing of their Persons, they were bound in love and respect to their Excellencies to restrain as well themselves as Followers, till a further course be taken by legal examination, where the aspersion began, the same being in their opinions the best and the only way to prevent the danger, &c.

Sometimes, if the Parliament be sitting, the King acquaints the Lords, and then departs; who having had Conference with the Commons, conclude of a Message to be sent to the Ambassadors, (either by requiring an account of the matter or confining of them) the persons to be sent, the two Speakers of both Houses, with some convenient number of either, having their Maces, or Ensigns of Offices born before them to the Ambassadors Gates, and then forborn; and then requesting speech with them, let them know that a relation being made that day in open Parliament of, &c. they were deputed from both Houses, the Great Council of the Kingdom, to the which by the Fundamental Laws of this Nation, the chief care of the Kings safety, and the publick peace and quiet of the Realm is committed; and that they were no less the High Court of Justice, or Superseas to all others, for the examining and punishing all attempts of so high a nature, &c. if it carry truth; and having executed their Commission, conclude that the Houses, to shew that reverence which they bear unto the dignity of his Master by their Message, declare that

that they two are never employed but to the King alone, were at that time sent, &c. and if the Houses shall upon return of their *Speakers* conceive their answers (if it be a matter that requires it) are such as may justly deserve their being confined, they then make an address to his *Majesty* to confine them to their Houses, restraining their departure till the Prince or State, whom they represent, be acquainted with their offence: And so it was done in 44 H. 3. to the *Popes Legates* in England, and 28 E. 1.

The *Parliament* not sitting, the Secretaries of State may signify the like, if occasion, &c.

XII. If a Foreign Ambassador, being a *Prorex*, commits here any Crime which is *contra Jus Gentium*, as Treason, Felony, Adultery, or any other crime which is against the Law of Nations, he loseth the privilege and dignity of an Ambassador, as unworthy of so high a place, and may be punished here as any other private Alien, and not to be remanded to his Sovereign but of courtesie.

The opinion of the Lord Coke, 4. *Instit.* fol. 153, &c.

XIII. But if any thing be *malum prohibitum* by any Act of *Parliament*, private Law, or Custom of this Realm, which is not *malum in se Jure Gentium*, nor *contra Jus Gentium*, an Ambassador residing here, shall not be bound by any of them; but otherwise it is of the Subjects of either Kingdom; for if a French Merchant or Spanish Merchant trades or imports any prohibited Goods, he must at his peril observe the Laws of England; and so it was adjudged *Pasc.* 33 *Eliz.* in the *Exchequer*, Tomlinson, *qui tam versus Henry de Vale & al.* upon the Statute of 19 H. 7. Cap. 21. but if an Ambassador imports any prohibited Goods, *è contra*.

The Florentines having sent Ambassadors to Charles the Fifth and Clement the Seventh, being then at *Bolonia*, together with their Household-stuff, they brought covertly many rich Commodities to sell and traffick with, supposing that they might be free from paying the Gabel; but the Searchers of the Custom-house having discovered it, they became objects of laughter and mirth to the *Bolonians*, and for that, as unworthy of the Office of Ambassadors, were remanded home without Audience.

Jovius fol. 125.

Sir Thomas Challoner having been sent Ambassador to Spain by Queen Elizabeth, remitted a Complaint to the Queen, that his Chests had been searched: upon which the Queen demanded the opinion of her Council in the point, who upon the whole matter resolved the action into

into this, *Legato omnia equi bonique ferenda dummodo Principis Honor non directè violetur*, the very words of Mr Camden, An Ambassador must bear all things patiently, provided that the Honour of the Prince (whom he serves) be not directly violated.

Leg. si F. de Lega. in aut. de sanctiss. S. rerum, coll. 9.

Lord Hobart,
fol. 71.

XIV. The Office of an Ambassador does not include a protection private but publick, for the King is Master, nor for any several Subject otherwise than as it concerns the King and his publick Ministers, to protect them, and procure their protection in foreign Kingdoms, in the nature of an *Office and Negotiation of State*; therefore their Quality is to mediate and prosecute for them or any one of them, at the *Council-Table*, which is as it were a *Court of State*; but when they come to settled Courts, which do and must observe essential forms of proceedings, *scil. processus legitimos*, they must be governed by them: and therefore in the Case of *Don Diego Serviento de Acuna*, Ambassador Leiger for the King of Spain, who libelled in the *Admiral Court* as *Procurator General* for all his Masters Subjects, against one *Jolliff* and *Tucker*, and *Sir Richard Bingley*, for two Ships and their Lading of divers kinds, of the Goods of the Subjects of the King of Spain generally, and not naming of them *adduct ad Port de Munster*, in the Preface of the Libel generally against them all, and then proceeds and charges them severally thus; That *Jolliff* and *Tucker* Captain *Pirate*, in alto *Mari bellicè dictas Naves aggressi sunt*, & per vim & violentiam took them, and that they were *adducta in partes Hibernia*, and that coming into the hands of *Sir Richard Bingley*, he converted them to his own use, (not saying where) and refusing to render them being required, it was there held that a *Prohibition* should go, for the matter is tryable meerly at the *Common Law*, and that such a *Procuracion* was not good, though to an Ambassador.

Don Alfonso de Valesco Ambassador from the *Catholick* King, attached *Tabacoës* at Land here, which one *Corvero*, a Subject of the King of Spain, brought hither, and the Ambassador by his Libel supposed to belong to his Master, as Goods confiscated, as all other his Goods were. *Sir John Watts* the Plaintiff in the suggestion, prayed a *Prohibition*, which was granted accordingly, for the property of Goods here at land must be tryed by the *Common*

LAW,

Law, however the Property be guided; and it was likewise rul'd, that if any Subject of a Foreign Prince bring Goods into this Kingdom, though they were confiscate before, the property shall not be questioned but at the Common Law. *Don Alfonso vers. Corvero, Mich. 9 Jac. Hob 212. Hill. 9 Jac.* upon the like Libel by *Don Pedro Sureza* Ambassador for *Spain*.

XV. Whether an Ambassador hath Jurisdiction over his own Family, and whether his House be a Sanctuary for all that fly into it, depends upon the concession of him with whom he resides, for this belongs not to the Law of Nations †; and it hath been seen that an Ambassador hath inflicted punishment on his own Servants and Vassals, as the *Moscovite* did here in *England*, but that must be purely by concession, as the *Turk* permits it to the *English* Ambassador at *Constantinople*: But for Fugitives that fly into their Houses, nay, their own Servants, if they have greatly offended, cannot be drawn out by force, without a demand and refusal; which then done, it is then become as an offence in them.

XVI. Most certain by the *Civil Law*, the moveable Goods of an Ambassador, which are accounted an accession to his Person, cannot be seized on, neither as a pledge, nor for payment of a debt, nor by Order or Execution of Judgment, no nor by the King or States leave where he resides (as some conceive) for all coercion ought to be far from an Ambassador, as well that which toucheth his necessities as his Person, that he may have full security; if therefore he hath contracted any debt, he is to be called upon kindly, and if he refuses, then Letters of Request are to go to his Master*; so that at last that course may be taken with him as with Debtors in another Territory; to some this may seem hard, yet Kings, who cannot be compelled, want not Creditors; but the Lord *Coke* seems to be of another opinion †, for as to Contracts and Debts that be good *Jure Gentium*, he must answer here.

* *Distingui ser-*
me hac in re
solent crimina.
Vide Parutam,
lib. 10. ubi
Rex Gallie
hanc ob causam
iratus pacatur.
Vide eundem,
lib. 11.
† *Grot. de Jure*
Belli ac Pacis,
lib. 18. §. 4.
5, 6, 7.

Rex facis nemetu
regium nuntium
populi Romani
Quiritum vasa
comitesq; meos:
yet an Eject-
ment hath been
brought and
left at the
House of the
Ambassador,
and it was al-
lowed good,
and conceived
no breach of
their privilege
in the Case of
Monsieur Colbert
for *Turk-House,*
Mich. 28. Car. 2.

in *Banc. Reg.* * *Grotius de Jure Belli ac Pacis, lib. 2. cap. 18.* † *Coke 4. Instit. fol. 153.* Certain it is that none dareth presume to meddle either with their Persons, Goods, or Servants, without leave had, the contempt of which hath been punished with Imprisonment.

XVII. If an Ambassador commits any private outrage against one of the Princes Subjects, with whom he resides, unless it be to defend the Dignity of his Charge, or of his Master, it hath been conceived by some not to be justifiable before the Prince with whom he resides; for (say they) there is a great difference between the *Dignity*, and *Authority* of the Prince in the Country of another Sovereign, for he may well retain his *Dignity*, but not his *Authority*. Usually injuries of that nature being done, they have admitted debates at a *Council of State*, where the Sovereign, with whom the Minister of State hath resided, being satisfied, that reparation ought to be made to the party injured, he hath been ordered, or at least requested, to comply with the same.

XVIII. But on the other hand, if any private outrage be committed by the Subjects of that Prince with whom he resides, upon his Person, the offenders may be subjected to punishment. The Queen of Sweden having made the *Incomparable Grotius* (after he had escaped by Providence out of Prison, and by a greater from his Country-men) her Ambassador with *Lewis* the Thirteenth, with whom he resided at *Paris*, coming one day from *St. Germans*, the *Secretary of Ceremonies* being in the Coach with him, it chanced that in one place as they passed, a great number of people were in the way seeing of an Execution, his *Postillion* and *Coach-man* driving boldly through the company, the *Archers* then attending the Execution with short Pieces, (concerned somewhat angrily that the Execution was disturbed) made after the Coach, shot his *Postillion* and *Coach-man*, and through the Coach, even through his Hat: the matter coming to be examined, the King ordered three or four of them to be hang'd, but that *Good Man* first pardoned them himself, and then obtained the King's.

XIX. The Republic of *Venice* employeth generally more Ambassadors abroad than any other State, and they are as those of other Princes be, *Ordinary* and *Extraordinary*; the Commission of the Ordinary continueth for three years, but he who resides at *Constantinople* is not called Ambassador, but *Bailio*, residing there perpetually; and that Republic allows him a greater provision to support his *Grandeur*, than to any other, and by the Laws of *Venice*

Barkseate in
memor. Grotii.

nice whatsoever he expends is allowed him upon his accounts without any examination; to which no other of their publick Ministers of State have like priviledge.

By the Laws of *Venice* there can be no Extraordinary Embassadour imployed, unless they have been Embassadors formerly, and upon their return are strictly examined of their comportment in their Legation, and are to discover what Presents they have received from the Prince or State to whom they were sent, the concealment of which is of a dangerous consequence. *Bodinus de Re. pub. lib. 3.*

Nor may any of their Embassadors receive any preferment from any other State during their Legation. The Patriarch of *Aquileia* dying, *Hermolao Barbaro* being there Embassadour for that Republick, the Pope conferred on him that Ecclesiastical Dignity, and made him a Cardinal; which being known at *Venice*, notwithstanding he was a Person of great Merit, and had given notice to the Senate, rich, well allied, and had good Friends, they sent express command that he should resign the Patriarchship, otherwise they would take from his Father the Procuratorship of *St. Mark*, and confiscate all his Estate. *Jac. Aug. Thuanus, l. 27. in Vit. Augustini Barbado Duke of Venice, An. 1486.*

But if such Embassadors have received any Present, Gift, or Reward from any Foreign Prince or Republick, and such Ministers of State are thought worthy of retaining the same, such a Grace must pass by the Suffrage of the Senate, to oblige them more to the benevolence of the Republick, than to the bounty of any Foreign Prince. The consideration of which put the same generous scruple into the breast of Sir *Amias Paulet*, who returning from his Embassy in *France*, would not at his departure receive from the French King the Chain of Gold which is given of course, till he was half a League out of *Paris*. But more famous was the late action of Sir *Leolin Jenkins*, His Majesties Embassadour at *Nimeguen*, who, though after the Treaty concluded, absolutely refused the French Kings Present. *Paulus Pavuta in Hist. Ven. lib. 7. Francis Hotoman fol. 23, 24.*

XX. By the Laws of Nations, in the Reception of Embassadors, those from a King are generally introduced by an Earl or Count, those from a Duke or Republick by a Baron; nor are they to be allowed that Honour but only at their first and last Audience.

XXI. Prophane Histories are full of Wars because of wrong

* Grot. *de Jure Belli ac Pacis*, l. 2. c. 18. §. 11.
† Montague Bishop of Norwich's Acts and Monuments of the Church, fol. 450.

wrong done to Ambassadors; and in the Sacred Story is extant the memory of the War which David upon that ground waged against the Ammonites: nor doth Cicero esteem any cause more just against Mithridates; and at this day not only Lawyers *, but Divines † are all of the same opinion, That a War cannot be more justly commenced than for the violation done to their Publick Ministers.

C H A P. XI.

Of the Right of delibering Persons fled for Protection.

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| <p>I. Where Superiours may become culpable for the crimes of their Subjects.</p> <p>II. Offences by whom properly punished, whether by the injured State, or they into whose Territory the offender is fled.</p> <p>III. Whether Kingdoms and States ought to deliver up Fugitives, if required, or not.</p> <p>IV. Where persons are fled, the places whither they come ought to be Asylums.</p> <p>V. How distinguished, and when to be punished or delivered.</p> <p>VI. Whether an innocent man may be deserted and delivered up to the enraged Power that de-</p> | <p>mands him.</p> <p>VII. Whether an innocent person may be deserted and yielded, if War be threatened.</p> <p>VIII. Whether an innocent person refused to be delivered up, ought to yield himself.</p> <p>IX. If Charity in an innocent to yield himself, whether compassion may be used if he refuses.</p> <p>X. Whether this of delivering up does extend to Sovereign Princes driven out of the Country.</p> <p>XI. Persons running away with the Publick Revenue, where their Persons and Goods have been seized till reparation and satisfaction be made.</p> |
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Zeno interceding for the Magnets to T. Quintus, and the Legates with him besought them with tears; ne unius amentiam civitati assignarent, suo quemq; periculo jacere. Liv. l. 40.

I. **F**Athers are not bound for the fault of their Children, nor Masters for those of their Servants; nor Princes for the actions of their Subjects, unless they become partakers in the Crimes; the which may be done in two respects, by sufferance and receipt; therefore if Princes shall suffer or countenance their Subjects, by Pictures or Libels, or otherwise to abuse another Nation or Commonwealth, it is the same as if they should authorize it. Brutus to Cicero, *How can you make me guilty? Yes, well enough, if it were in you to hinder it; but receipt may admit of some further scrutiny.*

II. Commonwealths being instituted, it was agreed that faults

faults of particulars, which do properly belong to their own Society, should be left to themselves and their Sovereigns, to be punished or connived at, as they judged most fit.

Yet that *Right* is not so absolutely left to them, but offences, which tend to the destruction of Society or Government, whereof *Treason* is the chiefest, may seem to be excepted; for if a Subject shall commit an act tending to the subversion of his Sovereign's Government, the same is an offence that's subject to an *universal punishment*, i. e. it is to be punished every where, and the Governours into whose Territory such fly, seem to have a Right of prosecuting for the offence: in Civil actions, which tend to Commerce that supports Society, the Subjects of Foreign Nations having justly contracted debts in their own Country, may obtain Justice in another; by a stronger reason it is thought that Princes or Republicks that have received publick injuries, have right to require punishment for the indignity that is offered them, at least for that which tended to the subversion of their Governments, and to have the offenders delivered up.

III. The question is illustrious, opinions grounded on several great Precedents have been both ways produced: it hath been generally held, That those Kingdoms where the offenders are fled, ought to do one of the two, *either punish them according to their deserts being called upon, or leave them to the Judgment of the offended State*; others on the contrary; most certain it is by the *delivering up* is understood, to leave him to the legal Judgment of that Prince or State, whom he hath offended: And such was the Declaration of *Ferdinand King of Spain*, who had been often requested by *Henry the Seventh* to deliver up *Edmond de la Poole Earl of Suffolk* his Subject, then fled for protection to that Prince's Country, but was always refused; but being continually importuned by promises that he should not be put to death, caused the Earl to be delivered up to him, who kept him in prison, and construing his promise *to be personal to himself*, commanded his Son *Henry* after his decease to execute him, who in the fifth Year of

§ Jac. in B. R.
Rolls Abridg-
ment, fol. 530.
Weyer's Case.

For the know-
ledge of the
cause ought to
precede the
dedition; non
deceat homines
dedere causa non
cognita. Plu-
tarch in his Ro-
mulus.

Attainted by
Act of Parlia-
ment 12 H. 7.
Co. Inst. fol. 180.

§ H. 8. vide
Lord Herberts
History of H. 8.

Pepin received and would not deliver up those that fled to him out of *Neustria*, oppressed by Tyranny. *Fredegar. in reb. Pep. An. 1188.*

Of Protection by the Laws of Nations.

his Reign in cold blood performed the same. But the malice of that politick Prince the Father, and the uncontrollable Will of the Son are Precedents but of small force; the example of which not long after gave the *French King* occasion to beware of trusting the latter with a Subject of his on the like occasion; for *Cardinal Pool* not many years after, coming Ambassadour from the *Pope* to the *French King*, they both being then in amity, and *Henry* the Eighth in League with the latter, but in enmity with the first, requested to have the *Cardinal* delivered up, but could not prevail, being doubly armed, as the Ambassadour of a Sovereign Prince, (for such is the *Pope*) and in the Territory of a Foreign State.

The *Israelites* require of the *Benjamites* to deliver up the wicked men, the *Philistines Samson*, *Cato* gave his Vote that *Cesar* should be delivered to the *Germans*, for spoiling them without just cause. Nor are nocent persons injured, if they are either delivered up, or punished; yet does it not thence follow that they must be delivered up or punished: the *Romans* delivered up those that had done violence to the *Carthaginian* Ambassadors; yet the Ambassadors of the *Assassines* having been traitorously murdered by one of the *Templars* at *Jerusalem*, the offender being demanded, that so Justice might be executed on him for the act, the *Grand Master* answered, That he had already enjoined him Penance, and had directed him to be sent to the *Pope*, but absolutely refused to deliver him up.

*Tyrim lib. 20.
cap. 23. Anno
1173.*

* Yet out of Churches beyond Seas for private offences, which are universal Sanctuaries, the offenders have been taken:

IV. But then, and as in this last, so in all other the offender must have committed some publick offence *, as Treason; for most certainly it extends not to private injuries, because there is no Precedent that ever a War was begun for such, though they may contribute much, but for those which tend to the subversion or ruine of a Country, they often have been delivered up; *Jugurtha* of *Boeochus* in *Salust*, So shalt thou at once free us from the sad ne-
in *Lusitania*, *Ferdinand* Lord Chamberlain was taken by force out of the Church and burnt, for forcing a Noble Virgin. *Mariana lib. 11.* *Charles* Duke of *Burgundy* delivered up to *Lewis* the Eleventh the Earl of *St. Paul*, Constable of *France*, who flying to some of his own Cities, obtained Letters of Safe-Conduct to come and commune with the Duke, in order to the making his peace with the King; but the Duke after he had him in custody, delivered him to the King of *France*, who immediately after cut off his head. *Phil. Comines l. 4. c. 12.*

cessity

cessary of prosecuting thee for thy error, and him for his Treason. And by most Writers it is agreed, that such offenders must either be delivered up or punished, the election is left to their choice into whose Territory they are fled; though some have held, that in case of Protection or Sanctuary for such unfortunate persons, Princes do make their Countries *Afylums* †.

† *Ludovicus Pius* us the Empe-
rour receiv-
ed those that
fled to him from the *Roman Church*, as appears by his Decree Anno 817. and *Luther* himself did not want Princes to protect him from the Fury of St. Peter's Chair. Vide his *Colloquiums*, Printed in London, An. 1663.

T. *Quintus Flaminius* sent Ambassadors to *Prusias* King of *Bithynia*, for the procuring the delivering up the Brave but unfortunate *Hannibal*, who accordingly being seized on, I will now, says he, deliver the Romans of that fear which hath so many years possess'd them; that fear which makes them impatient to attend the Death of an Old Man: This Victory of *Flaminius* over me, who am disarm'd and betrayed into his hands, shall never be numbred among the rest of his Heroical deeds: No, it shall make it manifest to all the Nations of the World, how far the ancient Roman virtue is degenerate and corrupted; for such was the Nobleness of their Forefathers, as when *Pyrrhus* invaded them in Italy, and was ready to give them Battle at their own doors, they gave him knowledge of the Treason intended against him, by Poyson, whereas those of a later race have employ'd *Flaminius*, a man who hath heretofore been of their Consuls, to practise with *Prusias*, contrary to the Honour of a King, contrary to his faith given, and contrary to the Laws of Hospitality, to slaughter, or deliver up his own guest.

V. Though Kingdoms and States are looked upon as places of Refuge, yet that must be understood for those that are persecuted with causeless hatred, not to such as have committed that which is injurious to humane Society, or to other men. *Gilippus* the *Laconian* in *Diodorus Siculus*, speaking of the Right of such miserable Fugitives, saith, They that introduced these Rights at first, meant the unfortunate should expect mercy, the injurious punishment—After—These men, if by the unjust desire of that which is anothers, they have fallen into these evils, must not accuse Fortune, nor impose on themselves the name of Suppliants, for that by right belongs to them that have an innocent mind and adverse Fortune.

Of Protection by the Laws of Nations.

Carum occidisti, dum vis succurrere: nullum
Crimen habes; manus est ibi prius, ac fuit ante.

*But the life of those men full of wicked acts shuts up against them all places of Refuge, and leaves no room for compassion. Cicero hath a Saying out of Demosthenes: We must shew compassion to those whom Fortune, not their own evil Deeds, hath made miserable. And by the Holy Law, when any one had been slain by an Ax slipping out of anothers hand, the Cities of Refuge were open: the most holy Altar it self was no protection for those that had slain an innocent man maliciously, or had troubled the Commonwealth; which Law Philo explaining saith, Unholy men have no entertainment in the Holy place. Lysurgus the Orator relates, that one Callistratus, having committed a Capital fault, and advising with the Oracle, received answer, That if he went to Athens he should have right: and thereupon in hopes of impunity he fled to the most holy Altar there, notwithstanding which he was taken from thence and put to death by the City most observant of her Religion, and so the Oracle was fulfilled. Princes indeed (saith Tacitus) are like Gods, but neither do the Gods hear the Prayers of Suppliants unless they be just. Such then are either to be punished or delivered up at least; yet surely this hath been observed to extend only to those crimes that touch the State, or at least are of a very hainous nature; sometimes they are expressly stipulated by Leagues to be delivered up; however this is to be observed, that such sort of Fugitives and Suppliants, be they Foreigners or Subjects, are to be protected till they have been fairly tryed; and if that whereof they are accused be not forbidden by the Law of Nature or Nations, the cause must be tryed and adjudged by the Municipal Laws of that Kingdom or State from whence the crime doth arise. From which it may be observed, that a fault committed in England, and the person flying and request made, yet by reason that none can by the Laws of that Nation be tryed but *per Pares*, nor then but in person, it will thence follow that such may seem out of the general rule; however it may stand with the highest reason, that the fact and proof being remitted over with the request, there may appear a just ground for the demand.*

They of Hol-
land lately de-
livered up the
famous poison-
ing Cook that
had been in the
wicked Con-
spiracy with
the Countess
of Soissons in
France.

VL. Whatever the opinion of those Writers have been, the practice of latter Ages have seemed to incline otherwise. *Queen Elizabeth* demanded *Morgan* and others of her Subjects fled into *France*, that had committed Treason against her; the answer of the *French King* was, *Si quid in Gallia machinarentur, Regem ex jure in illos animadversurum; sin in Anglia quid machinati fuerint, Regem non posse de eisdem cognoscere, & ex jure agere; omnia Regna profugis esse libera; Regum interesse, ut sui quisque Regni libertates tueatur, imo Elizabetham non ita pridem, in suum Regnum Mountgumerium, Principem Condaum, & alios à Gente Gallica admisisse, &c.* and they were never delivered up; but the like was not returned by the King of *Scotland*, for he promised that he would transmit *Fernihurst* and the Chancellor too, if they were convicted by a fair Tryal.

34 *Eliz. Camden*, fol. 35.
Vide *Camden*.
Anno 1585.

Perseus King of Macedon in his defence to *Martius*, speaking of those that were said to have conspired against *Eumenes*: So soon as I was admonished by you, and finding the men in *Macedonia*, I commanded them away, and charged them never to return into my Dominions. The Cry of the late Royal Martyrs Blood justly procured them of *Holland* to deliver up the Regicides to the injured Successour. And from the Crown of *Denmark* it was expressly stipulated they should be delivered, in these words: *Item quod si qui eorum qui rei sunt illius nefandi Parricidii in Regem CAROLUM Primum beatissima Memoriae admissi, ac legitime de eodem scelere atincti, condemnati, vel convicti, &c.* If any of them who are guilty of the horrid Murder committed upon King *CHARLES* the First of blessed Memory, be either now in the Dominions of the King of *Denmark* and *Norway*, or shall hereafter come thither, that as soon as it shall be known or told to the King of *Denmark*, or any of his Officers, they be forthwith apprehended, put in safe Custody, and sent back into *England*, or be delivered into the hands of those whom the King of *Great Britain* shall order to take charge of them, and bring them home.

Liv. lib. 22. cap. 37.

Anno 1660.

In the Alliance between those Crowns, Feb. 13. 1660. provided for in the fifth Article

VII. Most certain it is, if War be threatned to a Nation or People, if they deliver not up the offender, though perhaps he is innocent, and that such is the malice of his

the *Scots* a more equitable answer, when they demanded *Bothwell*, she answered, that she would either render him up, or send him out of *England*. *Camden* Anno 1593.

That politic Princess *Queen Elizabeth* gave answered, that

enemies, that they know they will put him to death, yet he may be deserted, especially if that Nation or Kingdom is inferiour to others; but then the same ought not to be done rashly. The *Italian Foot* that forsook the unfortunate *Pompey* before all was lost, being assured of Quarter from the Victorious *Cesar*, were condemned by most that reported the Story of that day.

Pope Alexander (in that mortal Feude between him and the *Emperour Frederick*, who favoured *Octavian* the *Antipope*) fled disguised to *Venice*, the *Duke* and *Senate* being jealous that the *Emperour* would demand him, sent an Embassy to the *Emperour* to endeavour a Mediation and Peace, which was no sooner offered, but the *Emperour* broke out into a rage, bidding them go home, saying; 'Tell your Prince and People, that *Frederick* the *Roman Emperour* demands his Enemy, who is come to them for succour, whom if they send not presently bound hand and foot, with a sure Guard, he will proclaim them Enemies to him and the whole *Empire*, and that there is neither Alliance or Laws of Nations which shall be able to free them from revenge for such an injury; to prosecute which, he is resolved to overturn all Divine and Humane Laws, that he will suddenly bring his Forces before their City, and contrary to their expectation, plant his *Victorious Eagles* on the Market-place of *St. Mark*. This Message being faithfully delivered, the *Senate* decreed Arms, Arms; and while they were preparing, News was brought that *Otho*, the *Emperour's* Son, and General of the *Cæsarian* Fleet, was entred the *Gulph* with seventy five Gallies; the most valiant and religious *Sebastiano Cyani* resolved to meet him, and having encountred them on the Coast of *Istria*, defeated *Otho* and all his Naval Forces, taking forty eight Gallies, *Otho* their *Admiral* and the rest either burnt or destroyed; he returned in Triumph for *Venice*, and not long after *Frederick* became converted, that Heaven fights the Battels of the Innocent, and on his knees beg'd pardon of *Alexander* the fugitive *Pope*.

Lewis the Eleventh of *France* required by Ambassadors of *Philip* Duke of *Burgundy*, the delivering up of *Sir Olivier de la Marche* (who being a *Burgundian*, had wrote (as was conceived) somewhat against the Claim of the *French* to several Territories) upon a publick Audience at *Lisla* they

*Hist. Reip. Ven.
In Vita Sebastiani
Cyani Duke
of Venice
An. 1164.*

they were answered by Duke Philip, That Oliver was Steward of his House, a Burgundian by birth, and in no respect subject to the Crown of France; notwithstanding if it could be proved that he had said or done any thing against the Kings Honour, he would see him punished according as his faults should deserve.

VIII. But admitting that such an Innocent Person ought not to be delivered up, whether he is bound to yield himself; by some it is conceived he ought not, because the nature of Civil Societies, which every one hath entred into for his own benefit, doth not require it; from which it follows, that though such persons are not bound to that by right, properly so called, yet it doth not follow, but in charity he seems bound to do it; for there be many offices not of proper Justice, but of love, which are not only performed with praises, but also cannot be omitted without blame; and such indeed is the act of such a persons voluntary yielding up himself, preferring the lives of an Innocent multitude before his own. Cicero for P. Sextus, *If this had happened to me sailing with my Friends in some Ship, that Pirates surrounding us should threaten to sink us, except they would deliver me, I would rather have cast my self into the Sea, to preserve the rest, than to bring my Friends either to certain death, or into great danger of their life.* The Request of the Noble Strafford is fresh in our memories.

consulit. And in Livy there is a most excellent saying of some Molossians: *Equidem pro Patria quæ letum oppetissent sape fando audiui; qui Patriam pro se perire æquum censerent, hi primi sunt.* Liv. lib. 45.

IX. But whether such an Innocent Person may be compelled to do that which perhaps he is bound to do, may be a question; rich men are bound by the precept of Mercy to give alms to the poor, yet cannot be compelled to give: it is one thing when the parts are compared among themselves, another when Superiours are compared to their Subjects, for an equal cannot compel his equal, but unto that which is due by right strictly taken; yet may a Superior compel his Inferiour to things which vertue commands; in a Famine to bring out provisions they have stored up, to yield him * to death that deserts his Colours, or turns Coward, to mulct those that wear excessive apparel †. And the like Phocion, pointing to his

Idem de suis
3. *Vir bonus &*
sapient, & Le-
gibus parens, &
civili officii
non ignarus, uti-
litat omnium
plusquam unus
alicujus aut si

* *Leg. Desert.*
† *Coke Instit.* 3.
fol. 199.
Plutarch. Phocion. *Fides agi*
visu deditas non
prodi. *Liv. l. 7.*
Satius iudice-
mus esse paucos
aliquos mala
ferre, quam im-
me sam multi-
tudinem.

The Son of
Pompey was so
worthy a Son
of so great a
Father, that he
contended
with *Anthony*
and *Augustus*
about the Em-

pirie of the World; this *Pompey* entertaining *Anthony* and *Augustus* in his Galley, the Captain which commanded it, demanded leave of him to weigh Anchor and to carry away his Guests, and to make his Rivals Prisoners: he answered him, That he ought to have done it without telling him of it, and should have made him great, without having made him forsworn: certainly an honest person will never be of the mind of this Captain; therefore in such extremities, *Counsellors* either for high advantages, or in the great necessities of their Prince, should serve their Masters with their Estates and Goods, but not with their Honour and Conscience.

12 H. 7.
Lord Bacon's
History of Hen-
ry the Seventh,
fol. 162.

X. But this delivering up does in no respect extend to Sovereign Princes, who are by Divine permission unfortunately driven out of their own Country; and therefore memorable is the great Treaty commonly called by the *Flemings*, *Intercursus Magnus*, where there was an express Article against the reception of the Rebels either of *Henry VII.* or of the *Arch-Duke of Burgundy* by others, purporting, That if any such Rebel should be required by the Prince, whose Rebel he was, of the Prince Confederate, that forthwith the Prince Confederate should by Proclamation command him to avoid the Country, which if he did not within fifteen days, the Rebel was to stand proscribed and put out of Protection. But a Prince, or one that hath a Sovereign Power, and had been contending for his Right, but success not crowning his hopes, occasioned his flight, hath always been excepted; to deliver up such, is even against Nature and the Majesty of Power; and therefore it is very remarkable what attempts were made for *E. 4. H. 7.* nay in the very Treaty of *Intercursus Magnus* it is memorable, that at that time *Perkin Warbeck* was contending with *H. 7.* for the Crown of *England* by the Name of *Richard Duke of York's* younger Son and surviving Heir Male of *Edward the Fourth.* My Lord Bacon does take a particular notice, that *Perkin Warbeck* in that very Treaty was not named nor contained, because he was no Rebel, but one that contended for the Title. Afterwards when *Perkin* was fled into Scotland,

Scotland, and there received by the Scottish King, Henry the Seventh sent to have *Perkin* delivered up, and it was one of the principal inducements of the King to accept of a Peace upon that condition, giving for an argument, that *Perkin* was a Reproach to all Kings, and a person not protected by the Laws of Nations; but the Scotch King peremptorily denied so to do, saying, *That he (for his part) was no competent Judge of Perkins Title, but that he had received him as a Suppliant, protected him as a person fled for refuge, espoused him with his Kinswoman, and aided him with Arms, upon the belief he was a Prince, and therefore he could not now with his Honour so unrip, and (in a sort) put a lye upon all that he had said and done before, as to deliver him up to his Enemies.* This was so peremptorily insisted on by the Scotch King, that Henry the Seventh was at length contented to wave the demand, and conclude a Peace without that Article; notwithstanding the King of Scotland had often in private declared, that he suspected *Perkin* for a Counterfeit. What endeavours were used by the late Usurper with those of Holland and with Cardinal *Mazarine* concerning his present Majesty, and how his Royal Person and Brothers were after the Murder of their blessed Father like Partridges hunted from place to place, the World and the shameful stories of that Age can too well evince. But on the other hand, as we have said, those that have committed offences that strike directly at Government and the Murder of their respective Princes, have found but cold harbour in the Territories of Foreign Princes; however in cases of like nature Princes have often stipulated with each other for the delivering up offenders of that magnitude as hath been already mentioned.

Lord Bacon's
History of Henry
the Seventh,
fol. 176.

XI. Persons that have wronged or defrauded Kings of their Revenue, especially in *England*, upon Letters of Request to those Princes whither they have fled, have been delivered up.

Some Florentine Merchants of the Society of the *Frisco-baldi*, being made Collectors and Receivers of the Kings Customs and Rents in *England, Wales, Ireland, and Gascoigne*, running away with those Monies, together with all their Estates and Goods for *Rome*, the King sent his Letters of Request to the Pope, desiring that they might be arrested, and their Persons and Goods seized, and sent over to satisfy

Rott. Rom. An.
4 E. 2. M. 17.
Dors.

he

Rott. Romæ 4
E. 2. M. 16.
Dorso.

He him for the damages he and his Subjects had sustained by them, promising not to proceed against them to the loss of their limbs or lives. Upon which Letters, the Pope seized on their Goods, and not long after the King Writ for the seizing of their Persons, for answering of other frauds and injuries.

Claus. 8 E. 2.
M. 31. Dorso
pro Regē.

The like was done for one *Anthony Fazons*, who had received 500 l. of the Kings Monies, and running away with it to *Lorraine*, the King writ to the same *Duke*, desiring that search might be made, and his person seized upon, and his Goods secured in every place within his Territories, till he should satisfy the said 500 l.

C H A P. XII.

Of Contribution paid by Places Neuter to both Armies in War.

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| <p>I. Of force used to Neuters whether lawful.</p> <p>II. Of Neuters, their duty considered in reference to either of the warring parties.</p> <p>III. Considerations general touching the same, and the chief matters that are objected by those that scruple thereat.</p> <p>IV. The case stated generally in the question propounded to our Saviour of paying tribute to Cæsar.</p> <p>V. In the payment of Contribution to an Enemy, what is necessary to be distinguished in the beginning of a War.</p> <p>VI. Of a second distinguishment drawn out of the first, of such payments, when a War is actually formed.</p> <p>VII. Where a man pays, but mislikes the cause, whether excusable, the</p> | <p>War not yet actually formed in the place.</p> <p>VIII. Where a Country is fully possessed, whether payment then is lawful.</p> <p>IX. Of the state of those that live on Frontiers, their condition considered in reference to procure their peace by Contribution.</p> <p>X. Of interdiction by him to places from whom faith is owing, Contribution notwithstanding being paid, whether the same creates an offence in them.</p> <p>XI. Of the genuine construction of such interdictions according to the true intention of the same.</p> <p>XII. Of the impunity and punishment that such innocent Offenders may be subjected to, in case of being questioned for the contempt by their right Governours.</p> |
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IT is manifest, there is no Right of War over Neuters in War; yet because by occasion of the War many things are usually done against such (Borderers especially)

cially) on pretence of necessity, there can be no excuse for the act, unless it be apparent necessity, and that the same ought to be extreme, for then it may give a right over what belongs to another man; for in such case, if the necessity be manifest, there may be such a proportion exacted as the necessity requires, that is, if the Custody suffices, the use of the thing is not to be taken; if the use, not the abuse, be necessary, yet is the price of the thing to be restored. *Moses*, when the highest necessity urged him and the people to pass through the Land of the *Idumeans*, first he saith, *he would pass along the high-way, and not divert into their Corn-fields or Vineyards; if he had need but of their water, he would pay a price for it.* The worthy Captains, both *Greek* and *Roman*, have done the like: In *Xenophon* the *Greeks* with *Clearchus*, promise the *Persians* to march away without any damage to the Country, and if they might have necessaries for money, they would take nothing by force. This vertue is oft commended in * *Bellisarius* by *Procopius* his Companion and Witness of his actions.

* See to this purpose his excellent Speech to his Souldiers near *Sicily*, when he marched into *Africk*, and the Narration of his March thorough *Africk*, *Vandal*. 1.

II. And as the Law doth preserve the Estates and Territories of such Neuters, or those that abstain from War, so on the other hand such ought to do nothing for either Party, but especially for him who maintains a bad cause, or whereby the motions of him who wagem a just War may be retarded; and in a doubtful case they ought to shew themselves equal (as we have mentioned elsewhere) to both in permitting passage, in affording provision for the Legions or Navies, and in not relieving the Besieged. *It is the duty of the Athenians, if they would not side with any party, either to prohibite the Corinthians from raising Souldiers out of Attica, or permit them to do the like.* So the Emperor and Confederate Princes of the Empire, with the Cantons of *Switzerland* in the late *German War*, and so of the King of *England*, who was so careful to preserve the Neutrality, that he issued forth his Proclamations to prohibite all persons, of what condition soever, to become Souldiers in the Service of any of the warring Princes. It was objected by the *Romans* against *Philip* King of the *Macedonians*, That the League was violated by him two ways, both because he did injuries to the *Fellows* of the *Roman* people, and because he assisted the Enemy with aids and money. The same

Exemplum nobile vide apud Parutam, lib. 8. Thucydides l. 1.

same things are urged by *Titus Quintus* in his Conference with *Nabis*, Yet thou sayest, *I have not violated you, nor your friendship and society*, how often shall I prove the contrary? In short, wherein is friendship violated? by these two things especially: *If thou hast my Friends for Enemies: if thou art a Friend to my Enemies: he is reckoned an Enemy who supplieth them with what is useful for the War.*

Procop. Goth. I.

III. But now there are many things that are useful for the War worthy of some consideration, the which are not so accounted at this day by the Laws of Nations; understand me, That I call the *Law of Nations*, which is at this day universally practised, as namely the supplying either or both of the warring Parties with Monies, or that w^{ch} is called *Contribution*. Now if the minds of the Subjects cannot be satisfied by the declaration of the cause, it will certainly be the office of a good Prince or General rather to impose upon them Contribution than Military service, especially when that Prince or General hath an Army sufficient to prosecute his designs, the which a just Commander may use as God doth the ready service of the Devil.

*Silv. in Verb.
bellum p. 1. n. 7.
circa finem.*

The most excellent *Grotius* having most incomparably treated on, and cleared all the important objections against a just War, together with the incidents of the same; yet this one main of *Contribution* or paying to both Armies, whether lawful, he hath not touched in any other words but these, *Quod sub tributo utrique parti prestando factum diu in Belgico, Germanico bello nuper vidimus, estque id con-*

† *Grot. de Jure Belli ac Pacis, lib. 3. cap. 12. §. 4. n. 2. * Lib. 2.*

sentaneum mori veteri Indorum †: and so cites a saying in *Diodorus Siculus* *, of the Peace that those People maintained in their possessions by reason of such Contributions. But to many persons this instance without further scrutiny, proves insufficient; for there are many, who not finding this liberty in their consciences, unnecessarily chuse rather to give up their bodies to restraint, and to abandon their whole means of subsistence in this World, both for themselves and their Children, (which ought not fondly to be done, *unless we would be worse than Infidels*, as *St. Paul* saith) they ground their resolution on this reason, that they know not whether the Monies they give may not furnish to the destruction of many Innocents, and perhaps the just Magistrate; yea, and the total subversion and ruine of their Country, Liberty and Religion: and

and therefore though men give and bestow their own where they please, yet in such cases they may not; therefore it may not be impertinent to examine whether these be necessary scruples in themselves, and such as admit of no exception of liberty, or whether those scruples be reasonable, or indeed meer scandal.

IV. The *Scribes* and *Pharisees* sought two ways to entrap *Our Saviour*; one was if he had blasphemously taught a new Religion, and a new *God*, (*viz.* himself) they hoped the people would be provok't to stone him for this, according to the *Hebrew Law*: The other was, to bring him within the compass of *Treason*, as if he could not lead great Multitudes after him without traiterous designs; but this gin failed too, because the Multitudes which followed him were always ready to defend him. However, when he was at *Jerusalem*, where the *Roman Troops* and *Prator* were; they thought they had him sure, by propounding this subject to him: Deut. 13.

Is it lawful to pay Tribute to Caesar? which was as much as to say, We who are descended from *Abraham*, and are the peculiar People, to whom God hath given the large Privileges of the Earth at home, to bathe our selves in Rivers of Milk and Honey, to have full Barns and many Children; yea, that GOD himself will be adored in no other place of the World but at this our *Jerusalem*, and that abroad we should triumph over the *Barbarous* and uncircumcised World by virtue of that *Militia*, which he never ordered for any but our selves; how are we then in duty or conscience to submit now to the Ordinances of the *Uncircumcised Romans*? or what right can he have to exercise supreme Jurisdiction over us, the privileged *Seed of Abraham*, by levying of Taxes on our Estates and Lands, which GOD himself laid out for us, by which means the *Emperour* and *Senate* hold this very Temple in slavery, and insult over our very Consciences and Religion, by defiling our very Sacrifices with the mixture of impure Blood; which as they are the price of our Blood, and a Tribute far above *Casars*, (payable in no other place but this Temple, which GOD himself built) so our Blood ought not to seem too dear to be sacrificed for the liberty of these; and though the *Roman State* could pretend, yet what can this *Caesar* pretend? every mans Conscience

science knows that it was but the other day he usurpt over the Senate, in which resides the true Jurisdiction of Rome; and if that were otherwise, yet how can he pretend to a Title, unless poyson be a pedigree, or violent usurpation a just Election, by which he who is but the greatest Thief in the World, would now pass for the most Sovereign and Legislative Prince? How then are we in conscience obliged to pay Tribute to this *Cesar*? Though those Lawyers thought in their Consciences that they were not to pay it, and that *Our Saviour* likewise, as a Jew, thought so too; yet they supposed he durst not say so much in the crowd; nor yet deny it by shifting it off with silence, lest the Roman Officers should apprehend him: But when *Our Saviour* shewed them *Cesar's* Face upon the Coyn, and bade them Render to *Cesar* that which was *Cesar's*, and to *GOD* that which was *GOD's*; His answer ran quite otherwise, not as some would have it; that by a subtilty he answered not to the point proposed, for then the sense of the whole Text would sound very ill in such terms, viz. If there be any thing due to *Cesar*, pay him it, and if any thing is due from you to *GOD*, then pay it likewise; This had been a weakening of *GOD's* Right for *Cesar's*, and to have left a desperate doubting in a necessity: 'Tis beyond all cavil that *Our Saviour's* opinion was positive for paying of Tribute to that *Cesar*, because *de facto* he did pay it; and the plain reason of it appears evidently in this his answer: *Cesar's* Face was upon the Coyn, that is to say, *Cesar* by Conquest was in possession of that Coyn, by possessing the place where he obliged them to take it; Coynning of Money being one Prerogative of Sovereign Power.

Mat. 22. 20.

Coke 3. Instit.
fol. 16, 17.

V. But to come more close to the question, whether Contribution may lawfully be paid: *perferre & inferre bellum*; the one is active, and properly at the beginning of a War, and in a place where yet no War is, and where its cause only, and not its effects can be considered; in this case every thing ought to be very clear for warrant of a mans Conscience, because of the calamities which he helps to introduce, and is in some manner the author of: the other is passive, and there where War, or the power of War is actually formed, which is the case of this Discourse.

VI. Secondly, We are to distinguish betwixt that which cannot be had, nor the value of it, unless we actually give it, and that which may be taken by the Law of War whether we contribute or no.

VII. Most certain it is, though a War be not yet actually formed in a place, yet a scrupling conscience, which likes not the cause, may be excused in contributing to it in this one case, viz. if some number of men, able to take what they ask, demand (with an armed power) the payment of a certain sum to be employed in War, then in such a case, the man, whom we suppose, may pay it as a ransom for his life, or give it as a man doth his purse, when he is surpris'd in the High-way, because to this man it is as much as if the whole Country were possess'd with an armed power. So several *Dutchies* and *Signiories* dependent on the *Empire*, do in the present War between them and the *Crown of France*, pay Contribution at this day.

4 H. 4. 2.

Procopius in the third of *Goths*. of *Totilas* when he besieged

Rome, saith, *Agriculis interim per omnem Italiam nihil mali intulit, sed iussit eos ita, ut filii erant, terram perpetuo securos colere, modo ut ipsi Tributa perferrent*: This, saith *Cassiodorus*, is the greatest praise. 12. 15.

But if the Person or Country be not for the time in full possession of him whose cause he scruples at, and that he or they have not a probable fear of extreme danger, nor as probable assurance, that without his help the thing demanded nor its value can be taken from him or them, then there's little excuse remains for the act, because the very act (which his conscience dislikes) participates more of action than of passion.

VIII. But where a Man or City is fully possess'd by an invading power (be the same just or unjust) from whom he or they cannot fly, nor remove their substance, most certain the payment of Contribution is no gift any more than he (as above) who with his own hands being set upon by Pirates or Robbers, puts his purse into their hands; for the Law calls not that a *Gift*, nor excuses the party from taking it: And although the parties may employ the same to the destruction perhaps of Innocents, and the like; yet that is an action out of their power that give, as far as winds and tempests are, to which two, as we contribute nothing, so we cannot be scrupulous in our Consciences concerning their bad effects; nor is the same repugnant

44 E. 3. 14.

4 H. 4. 3.

Coke 3. *Instit.* fol. 68.

to

C. 2. *de Treug. to the Canon Law*, (which teaches us humanity, and the
 & *Pace. Nic.* imitation of all their vertues) and therefore persons,
Damasc. whose lives are innocent and harmless, ought not to be
 subjected to danger or plunder, which hardly can be a-
 voided without Contribution or Tribute.

The quiet of
 the World
 cannot be had
 without Arms,
 no Arms with-
 out Souldiers
 pay, nor pay
 without Con-
 tribution. *Ta-
 cit. Hist. 4.*

IX. Again, those that live on Frontiers, whose condi-
 tion is more ticklish and deplorable, because they are not
 fully possess nor taken into the line of either party, these
 live as it were in the Suburbs of a Kingdom, and enjoy not
 the security or priviledges of others, yet such persons
 may lawfully contribute to both; for though they be but
 partly possess by one, and partly by the other, in respect
 of their sudden abandoning them, yet both parties have
 the power of destroying them wholly; wherefore those
 former reasons which justifie those fully possess, do also
 acquit the payments of these, for their condition here is
 more calamitous, seeing they are really but Tenants at
 Will, exposed to a perpetual Alarm, and that both par-
 ties wound one the other only through their sides, as those
 this day that are situate between *France* and *Germany*; for
 being perhaps Neuters in the War, they are in that case
 by the Law of Arms to shew themselves equal to both,
 in permitting of passage, in affording provisions for the
 Armies, and in not relieving the besieged.

*Exemplum no-
 bile vide apud
 Parutam, lib. 8.
 Grot. l. 3. c. 17.*

X. Nor can the interdiction of him, to whom such owe
 faith and obedience, any ways create the same an offence,
 since the declared Wills of our Governours cannot make
 all those of our acts sins, when we obey or submit to that
 power, which against our wills, (as much as against
 theirs, and it may be with more of our misery) hath di-
 vested them of the power of their Rights, and depri-
 ved us of the power of their Government; and by the
 Laws of War, they who have overcome, should govern
 those whom they have overcome; and therefore what-
 soever is exacted by the Conquerours, may justly be paid
 by the Conquered.

*Grotius de Jure
 Bell. ac Pac. l. 3.
 c. 8. §. 11. c. 12.
 §. 4*

And since Princes by their commands cannot change
 the nature of humane condition, which is subject naturally
 to those fore-mentioned changes, it would seem exceed-
 ing hard to oblige us to almost moral impossibilities; and
 though those political commands were as Laws, yet
 doubtless they ought not to be obliging, but according to
 the

the Legislative Rule, which is *cum sensu humana imbecillitatis*, this is that which is called the presumptuous Will * of a Governour, or the mind of a Law: for in extreme necessity it is to be presumed, that both their wills proceeding from the rigour of what they have declared, rather than by holding to that which is their supposed right, introduce certain miseries and confusion, without receiving any benefit thereby to themselves. Nor could they of *Utrecht*, and others of the conquered Cities in *Holland*, abandoned afterwards by the *French*, and entirely preserved from destruction, be condemned by their *Confederates*, for the sums by them promised to the Enemy for the preservation of the same.

Neither are such Commands or Interdictions without their sense and profit, though they be not positively obeyed, for thereby Governours shew to all the World, that they renounce no part of their right, no, though it be there where they cannot exercise any part of their just power.

the same remains, although the same King or his Successor be driven out of his Kingdom, for the right of the Kingdom remains, although he hath lost the possession. *Oronius de Jure Belli ac Pacis, lib. 2. cap. 17. §. 19.*

XI. Now the true intention of such Commands or Interdictions is, that the Enemy should not by any means be assisted or strengthened; but if such prohibitions should be obeyed, nay at such a time, when they and all their substance are absolutely possess'd by the Enemy, most certain such commands dash against themselves, and the one countermands the other; for if they refuse to submit in such a case, then they do that which advantages their Enemies, because at that time they will take all, whereas in case of submission they ask but a part.

XII. In all Wars there are always some, by whose disaffections Enemies gain more than by their compliance, just as Physicians do by distempers.

And although, by after variety of successes, the just Governour should recover that place, which so submitted to the power of their Enemies, and for that reason should punish those that were pliable to extreme necessity; yet it follows not upon that, that they who so conformed, sinned, or did that which was absolutely unlawful; for we well know that reason of State oft calls for Sacrifices where

L

there

Jure hoc evenit ut quod quisque ob tutelam corporis sui, jure fecisse existimetur.

** Leg. ut vim. D. de just. & jur.*

And that is apparently evinced by the Laws of Leagues; for such being made,

*In Republica
idem est nemi-
um, & nihil
mereri.*

Of the Naval Military part.

there is no fault to expiate: *Ostracism* and *Jealousie* make away those who are known to deserve most, but in strict right (which is the term of this question) the just Governor ought to look upon them as more unfortunate than faulty.

C H A P. XIII.

Of the Naval Military part.

- I. The advantage that Princes have by a good Commander.
- II. The love that naturally proceeds from the Mariners to those that are valiant and generous.
- III. Princes in prudence ought not to listen too much to the complaints against Commanders.
- IV. Of the faults generally considered in Souldiers and Mariners.
- V. Of the punishments that generally wait on such offenders.
- VI. Of Drunkenness, Swearing, and other such sort of impieties, not to be suffered in Fleets.
- VII. Spies, if lawful to use them by the Laws of Nations, but being apprehended are to suffer death; and how they are to be dealt withal by the Laws of England.
- VIII. It is not lawful for a Friend or Neuter to relieve an Enemy, and persons so offending, how punished.
- IX. Ships taken as prize, the Ship, papers, and other matters concerning the same are to be preserved.
- X. Of things taken and acquired in War, how the right of them becomes vested in the Captors, and how that is to be understood by the Law of Arms.
- XI. To steal the Cables or other Furniture of the King of England's Ships, how punishable at this day.
- XII. Ships surrendered or voluntarily yielded, how to be dealt with, and to those that shall resist, if entred by force, whether quarter may be refused.
- XIII. Ships of War generally ought not to be yielded; but if entred or disabled, whether they may, not accept of quarter, standing with the Oath called *Sacramentum Militare*.
- XIV. Of obeying Orders, the same ought punctually to be followed; and if broken, though the act succeeds well, whether the same subjects not the Actor to punishment.
- XV. Of the obligation incumbent on Commanders and Souldiers to behave themselves valiantly, and the right of slaying an Enemy, where lawful.
- XVI. Ships how obliged by the Law of Arms for the assistance of one another, and of the duty of those that have Fleets under their Convoy.
- XVII. An Enemy beaten ought to be pursued, and how far it is lawful to slay such flying with their lives in their hands, by the Law of Arms, and how the reeking sword ought to be governed.
- XVIII. Persons exempted from the sword by the Laws of Nature, Nations, Civil and Canon, and by the Municipal Laws of some Countries.
- XIX. Mutinying how esteemed, valued, and punished at this day by the practice of Armies, and by the Laws of England.
- XX. Whether it be lawful to decoy the Subjects, Souldiers, or Mariners of an Enemy to forsake his Prince or General, and to bring over his Men, Ships, or Arms, and where by Law they may be received; and how such deserters may be punished by the Laws of Nations and of England.
- XXI. Of

XXI. Of Seducers, Message-carriers and Decoyers of Souldiers, how to be handled by the Law of Arms.

XXII. Of those that shall disobey or strike their superiour Officers, how punishable.

XXIII. Of mutinying, and those that shall act in the same how punished, though they have a just cause of complaint.

XXIV. Of the care incumbent on Commanders and Masters of the Great Ships, in reference to their safety, and the punishment of wilful burning and destroying them.

XXV. Of the general offences at Sea, how punished.

XXVI. Court Marshals how erected, and what operation their Judgments have, and upon whom.

XXVII. Judges and Advocates Power in reference to give an Oath, and the Admiral's power how limited to the punishing of offences.

XXVIII. Of maimed Souldiers and Mariners, and the provisions that the Law makes for them at this day.

XXIX. Of Triumphs.

I. **A**N Excellent General is an evidence of the Fortune of a Prince, and the Instrument that occasions the happiness of a Kingdom; and therefore when GOD makes choice of a Person to repair the disorders of the World, or the good of a particular State, then is his care shewed in the furnishing him with necessary Principles to undertake great matters; the thoughts are put in his Soul by that Eternal Commander to execute, he troubles and confounds his Enemies, and leads him as by the hand to Victories and Triumphs: And one of the greatest expedients whereof he serves himself for this purpose, is to raise unto him excellent Men, both in Courage and Conduct, to whom he communicates his care, and who help him to bear the weight of Affairs. *Alexander* had never conquered *Asia*, or made the *Indies* to tremble, but for *Ephesion*, *Parmenio*, and *Clitus*; *Cesar* gained many a Battle by his Lieutenants; and the fairest Empire of the World, which ambition and the evil of the times had divided into three parts, was reduced under the Dominion of *Augustus* by the valour of *Agrippa*; *Justinian* triumphed over *Persia*, and destroyed the *Vandals* in *Africa*, and the *Goths* in *Italy* by the aid of *Bellisarius* and *Narcete*: And it is most certain, that Noble Commanders are the Glory of their Princes, and happiness of the People; on the other hand, base, cowardly, and treacherous Generals are the shame of the one, and the despair of the other.

II. Hence it is, that Souldiers and Mariners draw their lines of love even to the mouths of Cannons with a good General, but mutiny and hate to the main Yard end against

gainst one that is bad ; for to obey them who are not their Sovereigns when they do them hurt, when they insult and are cruel in cold blood, and base, cowardly or treacherous in Battel, is a sad necessity for them, and a hard essay of patience ; yet must they be obeyed, and the Souldiers and Mariners must not rebel or repine, but submit till the Sovereign redresses the misfortunes.

III. Again, *Princes* ought not to listen too much to the mutinous demands of the *Crew*, or any others, whose ambition watches their ruine, whereby to conceive anger against their *Commanders* ; for it is easier to purge out the choler and discontent that is got under the hatches, than to provide *Commanders of Conduct*, Courage, and Faithfulness to govern their Expeditions. *Belisarius*, that most excellent Commander, who had no other crime than his *Reputation*, and was not culpable, but that he was powerful, having conquered *Persia*, subdued *Africa*, humbled the *Goths* in *Italy*, led Kings in Triumph, and made appear to *Constantinople* somewhat of *Old Rome* ; an *Idea* of the ancient Splendour of that proud *Republick* ; after all his eminent Services, this *Great Person* is abandoned to *Envy* : a suspicion ill grounded destroys the value of so many Services, and a simple *Jealousie of State* wipes them out of the memory of his Prince : but he rests not there, for the demeanor had been too gentle, if cruelty had not been added to ingratitude ; they deprive him of all his Honours, they rob him of all his Fortune, they take from him the use of the day and light, they put out his Eyes, and reduce him to the company of Rogues, and the miserable *Belisarius* demands a charity, even that *Belisarius* the Chiefest General of his Age, and the *Greatest Ornament of the Empire*, who after so many Victories and Conquests, accompanied with so high and clear a Vertue, and in the midst of *Christendom*, was reduced to so abject and low a misery.

Nor was this cruel and hasty reckoning of *Justinian* let slip without a cruel payment ; for *Narcete*, who was as well a Successor in Merit as in Authority to *Belisarius*, having notice of a disdain, conceived likewise against him upon a single complaint, resolved not to expose himself as a Sacrifice to their malice ; and therefore thinking it better to shake off the yoke than stay to be oppressed, soon spoiled

Procopius Hist. Vandal. in Vita Bellisarii.

Vide Sir Walter Raleigh l. 5. c. 6. §. 2. And in that whole Paragraph the ingratitude that hath bin shewn by Princes to many Brave & Noble Generals and Commanders, there particularly enumerated.

spoiled the affairs of *Justinian*, for the *Goths* revolted, and Fortune would not forbear to be of the party which *Narcisse* followed, nor to find the *Barbarian* where so Brave a Captain was engaged. Therefore not one or many faults are to be listened to against Commanders, but patiently heard and redressed, not to disgrace or lose them; for such having committed a fault, yet being admonished by love, may endeavour by future Services to make recompence by some noble Exploit; but disgraced, become Instruments often of danger and ruine to their Superiours.

IV. Souldiers and Mariners faults are either proper to themselves, or common with others.

Those are common with others which other men fall into, and are corrected with like ordinary proceeding as other crimes of like nature, as Man-slaughter, Theft, Adultery, and such like.

Those are proper which do purely appertain to the *Naval Military* part, and are punished by some unusual or extraordinary punishment: As are these; Not to appear at the over musters or calling over the Ship, to serve under him he ought not to serve, to vage or wander long from on Ship-board, although he return of his own accord, to forsake his Fleet, Squadron, Ship, Captain, Commander, or Officer, to leave his standing to fly over to the Enemy, to betray the Fleet, Squadron or Ship, to be disobedient to his superiour Officers, to lose or sell his Arms, or steal another man's, to be negligent in his Officer's command or in his watch, to make a mutiny, to fly first out of the Battle, and the like, which are very frequently set forth in the Titles of the *Digest* and *Code* of Military affairs, and other like Titles which accompany them.

*S. De re milit.
De Castrensi pe-
culio, & C. eo-
dem tit. l. 12. C.
de exactione
milit. ris anno-
na & C. de vest.
militari.*

Arrian, who wrote the Life of *Alexander the Great*, observes, *Every thing is counted an offence in a Souldier, which is done contrary to the common Discipline*, as to be negligent, stubborn, and slothful.

V. The punishment wherewith Souldiers and Mariners are corrected, are those corporal punishments, or a pecuniary mulct or injunction of some service to be done, or a motion and removing out of their places, and sending away with shame.

By Capital punishment is understood for the most part death, or at least beating with *Cat with nine tails*, as they

commonly term it, *Ducking*, *Wooden horse*, *Gauntlet*, and such like, unless happily it be pardoned, either for the unskilfulness of the Mariner or Souldier, or the mutiny of the Crew or Company, being thereto drawn by Wine, Wantonness, or for the commiseration or pity of the Wife and Children of the party offending; all which is left to the discretion of the *Lord Admiral* and others the Supreme Commanders, or Captains.

13 Car. 2. cap. 9.
Artic. 2.

By Order of
his Royal High-
ness the Duke
of York 1666.

VI. It is necessary that in Armies and Fleets all manner of impiety should be prohibited, especially that of Swearing and Cursing; for such are sins so foolish, that they unawares trip men into damnation, rendring men worse than beasts, by how much the more they court that vanity of sin without any of the appendant allurements which other vicious actions are accompanied with, the same in the end teaching men to disavow GOD in their discourse and actions by their intemperate and inconsiderate invoking him in their Oaths. Against such, as also against those that shall give themselves up to Cursing, Execrations, Drunkenness, Uncleanliness, or other scandalous actions in derogation of God's Honour, and corruption of good manners, Fines and Imprisonment, or such other punishment may be inflicted on them by a Court Marshal, which is now reduced to the forfeiture of one days pay; but for drunkenness the same extends not to Commanders, or other Commission and Warrant-Officers; for they upon conviction before the *Admiral* shall be rendred incapable of their Command.

Artic. 1.

Artic. 3.

Lib. 1. 2. c. 3.
§. ult. ad Leg.
Corn. de Sican-
ris pun.

And a Lyar convicted on Ship-board, shall be hoisted upon the main-stay with four Braces, having a Broom and Shovel tyed to his back, where he shall continue an hour, every man crying, *A lyer, a lyer*, and a week following he shall clean the Ships head and sides without board, according to the ancient practice of the Navy; if he receives greater Wages than for an able Seaman, then half a days pay.

VII. By the *Laws of Nations*, Spies may be sent to survey the Enemy's Force, Fleet, Station or Squadron, and make discovery of whatsoever may give advantage to the persons sending: So *Moses* and *Joshua* did into the *Holy Land*. On the other hand being deprehended, they are to be put to death, as *Appian* saith. But whether it be law-
ful

ful to make Spies of the Subjects of that Prince with whom the War is begun, hath been some doubt: It is not lawful for a Subject to kill his King, nor to yield up his Ships of War without Publick Council, nor to spoil his fellow Citizens, to these things it is not lawful to tempt a Subject that remains such; nor may any reply, That to him who impelleth such a man to a wicked act, that act, as namely the betraying of his Enemy, is lawful; no body doubts, he may indeed do it, but not in that manner; but yet if a Subject will voluntarily desert his Prince and Country, *i. e.* so enter into a correspondency with the Enemy of it, without any impulse but his own covetous or revengeful mind, surely it cannot be unlawful for the other to receive him. *We receive a Fugitive by the Law of War*, saith *Celsus*, that is, it is not against the Law of War to admit such, even a Traitor, who having deserted the Enemies part electeth ours; however such persons ought not to be rendered, unless expressly stipulated*, but ought to be pardoned. By the Laws of England, if any Officer, Souldier or Mariner, in actual Service, and in pay in his Majesties Fleet, or any other person in the same, shall give, hold, or entertain any intelligence to or with any King, Prince or State, being Enemy to or any person in Rebellion against his Majesty, his Heirs and Successors, without leave or authority from the King, Admiral, Vice-Admiral, or Officers in Chief of any Squadron, they are to suffer death. Now the bare receipt of a Letter or Message from an Enemy, will not make a man subject to the penalty of this Article; and therefore the subsequent Article explains the precedent, in which it is provided, That if any inferiour Officer, Mariner, or Souldier shall receive any Letter or Message from any King, Foreign Prince, State, or Potentate, being an Enemy, or on their behalf, and if such person doth not reveal the same within twelve hours, having opportunity so to do, and acquaint the Superior Commander with it, such person is to suffer death; so likewise, if such Superior Officer, or Mariner being acquainted therewith by an inferiour Officer, Mariner, or other, or such Superior Officer, Commander or Mariner, in his own person, receiving a Letter or Message from any such Enemy or Rebel, and shall not in convenient time reveal the same to

*Leg. ansug.
D. de ecq. rerum
Dom.*

* As was in the Peace with Philip, the Aetolians, Antiochus, Polybius in excerpt. legat. 11. 28. 35. Menand. Protekt. idem nos decet.

*Stat. 13 Car. 2.
cap. 5. Artic. 3.*

Artic. 4.

the Admiral, Vice-Admiral or Commander of the Squadron, shall suffer the like pain of death, or such punishment as a Court Marshal shall inflict. Now Spies are put to death sometimes justly by those that manifestly have a just cause of Warring by others, by that licence which the Law of War granteth; nor ought any person to be moved with this, that such being taken, are punished with death; for that proceeds not from their having offended against the Law of Nations, but from this, that by the same Law every thing is lawful against an Enemy: And every one, as it is for his own profit, determineth either more rigorously or gently: but that Spies are both lawful and practicable, there is no question; for at this day by the general instructions of Fleets, there are always out of each Squadron some Frigats or Ships appointed to make discovery of the Enemy, and upon sight to make sail, and to stand with them, in order to take cognizance of their Force, as well Ships of War as Fire-Ships, and in what posture they lay; which being done, *those detecting Frigats are to speak together, and to conclude on the report they are to give, which done, they return to their respective Squadrons*; such Ships in such service are not obliged to fight, especially if the Enemies Force exceed them in number, or unless they shall have an apparent advantage.

Bartol. Leg. nul.
Ins. Leg. 2. de
Judeis Cœlico-
lis.

Procop. Goth. 1.

Stat. 13 Car. 2.
cap. 9. Artic. 5.

Artic. 6.

VIII. Again, it is not lawful for any, be he Friend or Neuter, to relieve an Enemy, much less for a Souldier or Mariner in pay: *to supply him that conspires the destruction of my Country, is a liberality not to be allowed of*: he is to be accounted an Enemy that supplies the Enemy with necessities for the War; and therefore by the Laws of War is so to be esteemed; and by the Laws of England, If any person in the Fleet relieve an Enemy or Rebel in time of War with Money, Victuals, Powder, Shot, Arms, Ammunition, or any other supplies whatsoever, directly or indirectly, he shall suffer death.

IX. Ships being assaulted and taken as prize, all the Papers, Charter-parties, Bills of Lading, Pass-ports, and other Writings whatsoever that shall be taken, seized or found aboard, are to be duly preserved, and not torn or made away; but the very Originals are to be sent up entirely and without fraud to the Court of Admiralty, or to the Commander appointed for that purpose, in order

order to the condemnation of the Prize, upon pain of the Captors losing their share in the Prize, and also subject to such other punishment as a Court Marshal shall think fit.

X. The Right of taking of spoil was approved of GOD, within those natural bounds which have been already mentioned, as is further evinced by the appointment of GOD in his *Law* concerning the Acquisition of Empire over the conquered, after refusal of Peace, *All the spoil thereof shalt thou take unto thy self, and thou shalt eat the spoil of thine enemies, which the LORD thy GOD hath given thee.* Hence it is, that things taken from the Enemy, presently become theirs that take them by the Law of Nations, and such acquisition is called *Natural*, for not any cause, but the naked fact is considered: And thence a Right ariseth; for as the Dominion of things began from Natural possession, and some print of the same remains in the things taken in the Land, the Sea, and the Air, so likewise of things taken in War; all which instantly become theirs that first become Captors: and from the Enemy are judged to be taken away those things also which are taken away from the Subjects of the Enemy. But though this gives a Right to the Captors, yet that must be understood to the Sovereign, or to the State that employed them, and not to themselves; but if they have any share of the Prize, the same proceeds by the concession or grant of the Sovereign, which may be enlarged or abridged as occasion serves; and therefore by the *Laws of England, Ships of War having taken a Prize, the Goods and all manner of Lading is to be preserved, till Adjudication shall pass*; but that is to be understood, where the Ship voluntarily yields: but Ships whom they shall assault, and take in fight as prize, the pillage of all manner of Goods and Merchandizes (other than Arms, Ammunition, Tackle, Furnitures or Stores of such Ships) as shall be found by the Captors, upon or above the Gun-deck of the Ship, become theirs; but this is to be understood where such prize may lawfully be possess; for there are times when such are not to be medled with; and therefore it is against the rules of War in fight, if some of the Enemies Ships are there disabled; yet those Ships that did so disable them, if they are in a condition to pursue the

Deut. 20. 14.

Leg. Nat. §. ult.
D. de acq. rer.
Dom. tit. de
rer. dom.

*Quæ armis qua-
sita essent &
parta belli jure,
non dimittenda.*

Artic. 7.

By the donation
of His Ma-
jesty.

Artic. 8.

the Enemy, cannot during the fight take, possess, or burn such disabled Ships, and the reason is, *lest by so doing some more important service be lost*, but they are to wait for such Booty, till the Flag-Officers shall give command for the same.

Hist. Reipubl.
Venet. fol. 127,
128.

Fluzzali, King of *Algier*, in the famous Battel of *Le-panto*, having behaved himself very valiantly there against the *Christians*, so that he destroyed several of their Gallies, and others, he took amongst the rest the Gallies of *Pietro Bua* of *Corsa*, of the *Prior* of *Messina*, and *Ludovico Tipico* of *Trabu*, and *Benedeto Soranza*, the which he towed after him before the Battle was compleated; but that getting proved the loss both of the one and the other; for the *Turks* out of covetousness of the plunder, or otherwise thronging into them, occasioned their taking fire, in which the *Victors* in those flames became *Victims*, and after followed the total rout of the *Ottoman Power*.

Artic. 3.

XI. It is almost impossible, but that in Ships of War, which in these days carry so considerable a force of men, there will be some amongst them that have heads of knavery, and fingers of Lime-twigs, not fearing to steal that from their Prince which is applicable only for the good of their Country; such sort of *Night-wolves* when caught, are to be severely punished; and therefore to steal or take away any *Cables*, *Anchors*, *Sails*, or any of the *Ships Furniture*, or any of the *Powder* or *Arms*, or *Ammunition* of the *Ship*, subjects the offender to the pains of death, or to such other punishment as the quality of the offence shall be found by a Court *Marshall* to deserve.

Artic. 9.

Cæsus perswading *Cyrus* not to give up *Tydia* to be pillaged by his men, tells him, *Non meam, inquit, non res meas diripies, nihil enim ad me jam ista adpertinent: tua sunt, tua illi perdent*, *Herod. lib. 1.*

XII. By the ninth Article, *Foreign Ships or Vessels taken as Prize, without fighting, none of the Captains, Masters, or Mariners being Foreigners, shall be stripped of their cloaths, or in any sort beaten, pillaged, or evil intreated; and the persons so offending being obliged to render double damage: this Law most expressly doth not extend to those that obstinately shall maintain a Fight; for most certain, by the Law of Arms, if the Ship be boarded and taken, there remains no restriction but that of charity; and if a Ship shall persist in the engagement, even till the last, and then yield to mercy, there hath been some doubt, * whether quarter ought to be given to such; (for they may igno-*

rantly *Victor. de Jure Belli, n. 49, & 60.*

rantly maintain with courage a bad cause) but in Captives and those that yield or desire to yield, there is no danger. Now that such may be justly killed, there must be some antecedent crime, and that such a one as an equal Judge would think worthy of death; and so we see great severity shewed to the Captives and those that have yielded, or their yielding on condition of life not accepted, if after they were convinced of the injustice of the War, they had nevertheless persisted with hatred or cruelty, if they had blotted their Enemies Name with unsufferable disgraces, if they had violated their Faith or any Right of Nations, as of Ambassadors, if they were Fugitives: But the Law of Nature admits not taliation, except against the very individual person that hath offended; nor doth it suffice that the Enemies are by a fiction conceived to be as it were one Body; though otherwise by the Laws of Nations, and by the Laws of Arms, and at this day practised, in all Fights, the small Frigats, Ketches and Smacks are to observe and take notice of the Enemies Fire-Ships, and to watch their motion, and to do their best to cut off their Boats, and generally *the persons found in them are to be put to death, if taken, and the Vessel, if not taken, destroyed;* and the reason why the extremity of War is used to such, is that by how much the mischief is the greater by the act of such men, if executed, by so much the punishment is aggravated, if taken, and quarter denied them by the Law of War.

D. & C. de Juris & facti ignorantia.

Princes indeed are Gods, but neither do the Gods hear the prayers of supplicants, except they be just.

The Syracusians were accused for that they slew the Wives and Children of Hycetas, because Hycetas had slain the Sister and Son of Dion. Plutarch, Timon, & Dion.

XIII. Every Captain or Commander upon signal or order of Battle, or view, or sight of any Ships of the Enemy, Pirate, or Rebel, or likelihood of engagement, are to put all things of the Fleet to tack first, the Admiral did generally put abroad the Union-Flag at the staff on the fore-top-Mast-head (that was when the Red Flag was not abroad.) But if the Red Flag had been abroad, then the fore-top sail was to be loosed a little, and the Union-Flag was to be spread from the Cap of the fore-top-Mast downwards. When the Rear of the Fleet was to tack first, the Union-Flag was put abroad on the Flag-staff of the Mizzen-top-Mast-head, upon which two signals the Flag-Ships were to continue the same signals on their Ships, till the same was answered: when the Admiral would have all the Ships to fall into the Order of Battle prescribed at the Council of War, the Union-Flag was put on the Mizzen-Peak of the Admiral's Ship, upon sight of which the Admirals of the other Squadrons were to answer it by doing the like signal: when the Admiral would have the other Squadrons to make more sail, though himself shorten sail, a white Ensign was put on the Ensign-staff of the Admiral's Ship: Instructions first of May 1666, but yet signals may be altered or changed as often as it shall please the Admiral to think the same necessary and convenient.

In England when the Admiral would have the Van

Of the Naval Military part.

Artic. 10.

in the Ship in fit posture for a Fight, as the breaking down the Cabins, clearing of the Ships of all things that may impede the Souldiers in the preserving the Ship and themselves, and endamaging the Enemy; and every such Commander or Captain are in their own persons, and according to their place, to hearten and encourage the inferiour Officers and common men to fight valiantly and courageously, and not to behave themselves faintly, under the disgrace of being cashiered, and if he or they yield to the Enemy, Pirate, or Rebel, or cry for quarter, he or they so doing, shall suffer the pains of death, or such other punishment as the offence shall deserve. Now, though Souldiers or Mariners have obliged themselves faithfully to serve in the Expedition or Navy; yet that is to be understood no further than his or their power to do his utmost in his or their Quality; for though the obligation for the Service be taken in the strictest terms of undergoing death and danger; yet it is to be understood always conditionally as most promises are, viz. if the action or passion may be for that Fleet or Princes advantage; and therefore if the Fleet or Squadron is beaten, and the Ships are disabled, and left scarce without any to defend them, now the Souldiers or Mariners remaining can do no more for their Prince than dye, which indeed is to do nothing at all, but to cease for ever from doing any thing either for him or themselves; in those straits therefore it is not repugnant to their Oath called *Sacramentum Militare*, to ask quarter or strike, and having beg'd a new life and taken it, they are bound in a new and just obligation of Fidelity to those whom they were bound to kill few hours before; neither can the Prince or General expect by virtue of their former obligation to him, they should kill any in the place where the quarter was given: however this Fidelity hath not its inception from the time of taking quarter; but when the Battle is over, and that time which is termed cold blood; for without all controversie, if a Ship be boarded, and quarter is given, yet if while the Fight lasts, the persons Captives can by any possibility recover their liberty and Ship, they may by the Law of Arms justly acquire the same*.

Lipsius de Mil. Rom. l. 2. dial. 6, & 4. And Polybius expresseth the Oath thus, Obtemperaturus sum, & facturus quicquid mandabitur ab Imperatoribus juxta vires: and such, says he, were termed Milites per Sacramentum.

* Sir Thomas Chicheley did so aboard the Katherine in bello, Anno 1666. inter Carolum Secundum & Celsos & Præpotentes Dominos Ordines Generales Fœderati Belgii.

And

And since impunity is granted to such unfortunate deserters, yet it must be apparently evident and fully proved, that they were reduced into a condition beyond all hope in the Battle: and therefore the Foot that forsook the *Unfortunate Pompey* before the Field was lost, were justly condemned for the breach of the *Roman Discipline* and *Law of Arms*: and therefore the Article hath not positively declared death only, but added, or such other punishment as the offence shall deserve, which provision leaves the Action to be judged and punished by a *Council of War*, who know best what's to be done in cases of that nature; however, *a base or cowardly yielding, or crying quarter, is to be punished with death, and that without mercy.*

XIV. The obeying of Orders hath in all Ages been in mighty esteem: *Chrysantus*, one of *Cyrus's* Souldiers, being upon his Enemy, withdrew his Sword, hearing a Retreat sounded; but this comes not from the external *Laws of Nations*; for as it is lawful to seize on the Enemy's Goods, so likewise to kill the Enemy, for by that Law the Enemies are of no account; but such obedience proceeds from the *Military Discipline* of several Nations. By the

Xenoph. Cyr.
Plutarch. Qu.
Rom. 39. &
Marcell.
Vide in Tit.
Ships of War.

Romans it was a Law noted by *Modestinus*; That whosoever obeyed not his Orders, should be punished with death, though the matter succeeded well: now he also was supposed not to have obeyed, who out of Order without the Command of the *General* entred into any Fight. For if such liberty were lawful, either Stations would be deserted, or (licence proceeding) the Army, Fleet, or Squadron would be engaged in unadvised Battles, which by all means is to be avoided. *M. Capello*, a *Venetian* Gentleman of an ancient Extraction, having the Charge of the

Leg. desert. D.
de re Milit.

Liv. lib. 7. Man-
liani Imperia.

guarding of the *Venetian Gulph* *, met with the *Barbary Fleet*, whom he so assaulted, that he burnt and took divers of them; among the rest the *Admiral Galley of Algier*, (a Vessel of vast bigness) which he brought with him away, and she remains at this day a *Trophy* in the *Arsenal of Venice*; the Service, although Noble and Honourable, and such as brought renown to the Republick, yet in regard some of the Enemy, yet must they not pursue a small number, before the main of the Enemy be beaten or run. Nor ought they in chasing, chase beyond sight of the Flag, and at night all chasing Ships are to return to the Flag. *Instr. 22, 23. in May 1. 1656:*

The Order of
Battle is to be
preserved, and
in all cases
they are to en-
deavour to
keep in one
line as much as
may be; and
though they
have beaten

* History of the Republick of *Venice*, fol. 170, 171.

Artic. 11.

it was an Action exceeding his Commission, he was adjudged to punishment: (but his great Merit and Alliance preserved his life) such an exact obedience that *Signury* expects to be paid to her Orders, be the success never so glorious. And by the eleventh Article, Every Captain, Commander and other Officer, Seaman or Soldier of any Ship, Frigate or Vessel of War, are duty to obey the Commands of the Admiral or other his Superior, or Commander of any Squadron, as well for the attacking and setting upon any Fleet, Squadron, or Ships of the Enemy, Pirate or Rebels; or joining Battle with them, or making defence against them, as all other the Commands of the Admiral, or other his Superior Commander. the disobeying of which subjects him to the pains of death, or such other punishment as the quality or neglect of his offence shall deserve.

Artic. 12.

XV. Again, Every Captain and all other Officers, Partners and Soldiers of every Ship, Frigate, or Vessel of War, shall not in time of any Fight or Engagement withdraw or keep back; but on the other hand, they are to come into the Battle, and engage, and do their utmost endeavour to take, fire, kill, and endamage the Enemy, Pirate or Rebel, and assist and relieve all other his Confederate Ships; and if they shall prove Cowards, they are to be dealt with as Cowards ought by the Law of Arms, which is to suffer death: But circumstances of things may make alteration of matters, therefore there is added other punishment, as the circumstance of the offence shall deserve, or a Court Marshal think fit. By the word Captain the General or Admiral is not included, but all Flag-Officers and others under them, are within the purview of the Statute by the denomination of the word Captain, &c. and the reason wherefore such Commanders in Chief are not within the Law, is, because the Weapon of a General is his Truncheon, but of all other Officers is the Sword; a General is only to command, and the rest to execute, for in the latter is the danger only of one mans life, but in the first is the hazard of all; therefore by the Law of Arms no General or Admiral in Chief ought to expose their person to apparent peril, but in case of a ge-

In milite unus fors est, in Imperatore universorum periculum: unus homo plura fuit quam universa civitas.

Clearchus Cyro dedit consilium, ne ipse se in periculum offerret, sed in pectorem se pugna gereret; pugnanti enim corpore nil magni efficeret, si vero quid damni acceperit, omnes se perditurum quos secum haberet. Polyb. Strab. lib. 2.

neral

neral overthrow and manifest defeat. *Peter Capponi* the Famous General for the *Florentines* besieging *Soiana*, and encamping on the River *Casina*, being in a place of danger, extremely industrious about planting his Battery, was shot with a Harquebuss, immediately upon which the Siege was raised; yet on the other hand, let it be examined where any famous Battle hath been obtained, and the same was not got, not only by the Conduct, but likewise by the single and personal Courage of the General.

There are some offices to be done, even to them from whom you have received an injury; for revenge and punishment must have a measure; and therefore the issues of the *Roman Wars* were either mild or necessary: now when killing is just in a just War, according to internal

Cicero Offic. 1.
Aphor. 28.

Justice, may be known by examining the causes or end of the War, which may be for the conservation of Life and Members, and the keeping and acquiring of things useful unto life; now in the assaulting of Ships, it happens that one is slain on purpose or without purpose; on purpose can no man be slain justly, unless either for just punishment, as without it we cannot protect and defend our life, Goods, and Country, &c. That such punishment may be just, it is necessary that he who is slain have offended, and that so much as may be avenged with the punishment of death in the Sentence of an equal Judge.

*Grotius de Jure
Belli ac Pacis,
l. 1. c. 2. §. 1.*

Now we must note, between full injury and meer misfortune often intercedes some mean, which is as it were composed of both, so that it can neither be called the act of one knowing and willing, nor merely the act of one ignorant or unwilling.

*Misericordia
infortunis de-
betur: at qui de-
liberatâ scientiâ
malè agit, non
infelix, sed in-
justus: And Ci-
cero hath a say-
ing out of De-
mosthenes; We
must shew
compassion to
those whom
Fortune, not
their own
Deeds, have
made misera-
ble.*

This distinction by *Themistius* is fully illustrated: You have made a difference betwixt an injury, a fault, and a misfortune; although you neither study *Plato*, nor read *Aristotle*, yet you put their Doctrine in practice; for you have not thought them worthy of equal punishment, who from the beginning persuaded the War, and who afterward were carried with the stream, and who at last submitted to him, that now seemed to have the highest power; the first you condemned, the next you chastised, the last you pitied. Most certain, to spare Captives or Prisoners of War, is a command of goodness and equity; and in Histories they are often commended, who when too great a number prove burdensom

or

Scipio Amilianus at the overthrow of Carthage, proclaimed that they should fly that would.

Polybius, vide Tacitus Annal. 12.

Vide Serran. in reb. Franc. 1.

¶ Hen. 2.

Thucyd. lib. 3.

** Caesar lib. 2.*

de bello Gallico.

† Dinant in

Germany be-

ing taken by

Assault, the

Town was ra-

zed and burnt,

and the Prisoners all put to death.

Vide Phil. Comin. lib. 2. cap. 1.

of dangerous, chose rather to let them all go than to slay them, or detain them, though for Ransoms; as in the last Flemish Wars with England. So for the same causes, they that strike or yield up themselves are not to be slain, (though there is no provision made by Covenant.) In Towns besieged it was observed by the Romans, before the Ram had smitten the Wall; *Caesar* * denounceth to the *Advatici*, he would save their City, if before the Ram had touched the Wall, they yielded; which is still in use in weak Places, before the great Guns are fired; in strong Places, before an Assault is made upon the Walls †; and at Sea, by firing one or two Guns, or hanging out the bloody Flag, according as the instructions are; however till there be an absolute yielding or quarter cryed, by the Law of Arms, as well as by the above mentioned Article, every Commander and Souldier is to do his utmost to take, fire, kill, and endamage the Enemy, or whatsoever may tend thereunto.

XVI. By the Law of Arms, he deserves punishment who doth not keep off force that is offered to his fellow Souldier; and though it hath been conceived, if there be manifest danger, that he is not bound to come in to his relief; for such Commander may prefer the lives in his own Ship before those in another, yet that suffices not; for every Souldier by the Law of Arms, is not only bound to defend, but also to assist and relieve his Companion; now Companions are in two respects, either those that are in actual service with such Souldiers. or those that are not, but only committed to their protection or Convoy, which are to be defended and guarded at the same peril and charge that a fellow Souldier is; and therefore all Ships that are committed to Convoy and Guard, They are diligently and carefully to be attended upon without delay, according to their Instructions, in that behalf: And whosoever shall be faulty therein, and shall not faithfully perform the same, and defend the Ships and Goods in their Convoy without either diverting to other parts or occasions, or refusing or neglecting to fight in their defence, if they be set upon or assailed, or running away cowardly, and submitting those in their Convoy to hazard

I will defend my Companion at the cost of my own Blood, and partake in his danger. *Senec. de Ben. 2. 15.*

Artic. 13.

hazard and peril, or shall demand or exact any Money or other reward from any Merchant or Master, for conveying of any such Ships or other Vessels belonging to His Majesty's Subjects, shall be condemned to make reparation of the damage to the Merchants, Owners, or others, as the Court of Admiralty shall adjudge, and also be punished criminally according to the quality of their offences, be it by pains of death or other punishment, according as shall be adjudged fit by that Court Marshal.

Protection of Convoys by the *Laws of Nations* is of a great utility to a Kingdom or State; therefore when violence is offered to those Ships under Convoy, they are not said to be done to them, but to those Ships of War under whose Guard they pass; and therefore when violence is offered to such, publick revenge is let in, according to that of *Tacitus*, *He should provide for their security by a just revenge*. Now that such Ships may not suffer wrong from such Invaders, two ways may be taken by the Convoys; first, by destroying him or them that shall have attempted and committed any Hostile act against any thing under their protection: secondly, by all ways imaginable endeavour the weakning his or their Force, that he or they may not be able to do any other or further hurt; therefore there is no doubt but vindication to these ends is within the bounds of Equity, though this is no more than private; yet if we respect the bare Law of Nature, abstract from Laws Divine and Humane, and from all necessary accidents to things, it is not unlawful whether the satisfaction or revenge is taken by the Convoy Ships themselves or the wronged ones under his or their Guard and Protection, seeing it is consentaneous to Nature, that man should receive aid from man; and in this sense may be admitted that saying of *Cicero*, *The Law of Nature is that which comes not from opinion, but innate virtue*: Among the examples of it is placed *Vindication*, which he opposes to favour, and that none might doubt how much he would have understood by that name, he defines *Vindication*, *whereby, by defending or revenging, we keep off force and contumely from us and ours, who ought to be dear to us, and whereby we punish offences*.

Now those Ships that are not under Convoy, but engaged in fight, are faithfully to be relieved; and therefore

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fore

Etiam hujus rei in feris imago quadam. Leo in Adulteræ poenam consurgit. Plin. Hist. Nat. 8. 16.

fore if a Squadron shall happen to be over charged and distressed, the next Squadron or Ships are to make towards their relief and assistance upon a signal given them; which is generally given in the *Admirals* Squadron by a Pendant on the fore-top-Mast head of any Flag-Ship; in the *Vice-Admirals* Squadron, or he that commands in Chief in the second place, a Pendant on the main top-Mast head, and the *Reer-Admirals* Squadron the like: but these signals sometimes change, according to the wisdom and resolution of the *Admiral*. Again, Ships that are disabled by loss of Masts, shot under water, or the like, so as they be in danger of sinking or taking, the distressed Ships generally make a sign by waft of their *Jack* and *Ensigns*, and those next to them are bound to their relief; but yet this does not always hold place: for if the distressed Ship is not in probability of sinking, or otherwise encompassed with the Enemy, the reliever is not to stay under pretence of securing them, but ought to follow his Leader and the Battle, leaving such lame Ships to the Stern-most of the Fleet; it being an undoubted Maxime, *That nothing but beating the Body of the Enemy can effectually secure such disabled Ships.*

XVII. It is not enough that men behave themselves valiantly in the beating of an Enemy, for that is not all, but the reducing of them into a condition to render right either for damage done, or to render that which is right; which cannot well be done without bringing him to exigences and straits; and therefore if the Enemy, Pirate, or Rebel be beaten, ~~None~~, neither through cowardize, negligence, or disaffection, ought to forbear the pursuit, and those of them flying, nor ought such either through cowardize, negligence, or disaffection forbear the assisting of a known friend in biew, to their utmost power, the breach of which subjects the offenders to the pains of death, or at least such punishment as a *Court Marshal* shall think fit.

Artic. 14.

But that is to be understood as in the XII. S. of this Chapter.

Empires are got by Arms, and propagated by Victory; and by the *Laws of War*, they that have overcome, should govern those they have subdued. Hence it is, that Generals having compleated a Conquest in a just War, and in chase or otherwise have taken the Ships or Goods of the Enemy, have absolute power over the Lives, Estates, Ships

Ships and things that they by force of Arms have acquired by the *Laws of Nations*.

But yet in such Conquests where the reeking Sword knows no Law, that is, they are done *impune*, without punishment, (because co-active Judges do grant them their authority) yet such power may be exorbitant from that Rule of Right called *Virtue*; and though by the *Law of War* Captives may be slain, yet what Law forbids not, modesty prohibits to be done. Hence it is, that *Generals* do often restrain that power of killing; for though such Prisoners of War do fight for the maintenance of an unjust cause, and although the War is begun by a solemn manner; yet all acts that have their rise from thence, are unjust by internal injustice, so that they who knowingly do persist in fighting *, yet ought they not always to be slain, according to that of *Seneca*: *Cruel are they*, says he†, *that have cause of punishment, but have no measure*. For he that in punishing goes further than is meet, is the second author of injury; and the principal reason why mercy is often shewed, is, for that Souldiers of Fortune offend not out of any hatred or cruelty, but out of duty.

XVIII. Again, *Generals* in the measure of killing, look commonly no further than the destruction of those who by force of Arms oppose them; and though Ships or Cities are taken by assault, the which by the *Laws of War* subjects every individual to the mercy of the Conquerour, yet Children, Women, Old Men, Priests, Scholars, and Husbandmen are to be spared; the first by the *Law of Nature*, according to that of *Camillus*: *We have Arms*, *In Vita Camilli* says he, *not against that age which even in taking Cities is spared, but against armed men*, and this is the *Law of Arms* amongst good men; by which we are to note, that by the words *good Men*, as is observed, we mean the *Law of Nature*, for strictly by the *Law of Arms* the slayers of them are without punishment.

that many pretences may be found out against men of mature age, but against Infantes, calumny it self can find nothing to say, as being clearly innocents.

Now that which hath always place in Children that have not attained the use of Reason, for the most part prevails with Women; that is, unless they have committed

*Tacit. 3. Annal.
Pompeius gravior remediis
quam delicta
erant.*

** Grot. de Jure
Bell. ac Pacis,
l. 3. c. 10. §.
† 2. de Clem.
cap. 4.*

*In Vita Camilli
Liv. lib. 1, & 5.*

*Grotius de Jure
Bell. ac Pacis,
lib. 3. cap. 11.
who observes,*

Herod. in Vita
Maximin. fol.
417.

Papin. nullis
violabilis armis
turba senes.
Vitt. D. lscp.
1 Sam. 10. 5. &
1 Sam. 19. 18.

* Lord Coke's
Comm. on 30.
Cap. of Magna
Charta, fol. 58.
C. de Truga.
& Pace.

Leg. execut. C.
qua res pign.

Vide 2. Instit.
fol. 58. & Trin.
21 E. 1. coram
Rege Rot. 127.

De Benefic. 5.
cap. 18.

something peculiarly to be avenged, or do usurp manly offices, as flinging of stones from the Walls, pouring down burning Pitch, Brimstone, and the like bituminous stuff, firing of Guns, and the like; for it is a Sex that hath nothing to do with the Sword, that are capable of that clemency.

The like for Old men, who, *Papinius* observes, are not to be slain; so for Ministers of Sacred things, even Barbarous Nations have had them in reverence and preservation; as the *Philistines*, enemies of the *Jews*, did to the *Colledge of Prophets*, to whom they did no harm: and with those Priests are justly equalled in this respect, they that have chose a like kind of life, as *Monks* and *Penitents*, whom therefore as well as Priests, the *Canons* following in natural equity will have spared*: to these are deservedly added those that give themselves to the study of good Learning and Sciences useful to Mankind, be it in *Universities*, or other publick *Schools* or *Colledges*. But yet if any of these be taken in actual Service, they then may receive the common Fate of others. So our King *Richard* the First having taken the Martial Bishop of *Beauvois* Prisoner, received a Letter from the *Pope*, that he should no longer detain in Custody his Dear Son; the King sent the *Pope* back the Armour wherein he was taken, with the words of *Jacob's* Sons to their Father, *See whether or no this be the Coat of thy Son*.

To these are added Tradesmen, so likewise Merchants, which is not only to be understood of them that stay for a time in the Enemies Quarters, (but of perpetual Subjects) for their life hath nothing to do with Arms, and under that name are also contained other Workmen and Artificers, whose gain loves not War, but Peace.

Again, Captives and those that yield are not to be slain, for to spare such is a command of goodness and equity, says *Seneca*; however it may so come to pass, that though the Military power may exempt a Prisoner of War from the execution of the Sword, yet it may be out of their power to exempt or discharge a Delinquent or Traitor from the execution of the Magistrate, as if the Fleet were prepared, and the War principally begun for the suppression of such; and the reason of this is, if it should be in the power of one Souldier, who takes a Trai-
tor

tor Prisoner upon such terms, it would *pari ratione* be in the power of all to pardon; not that the Article hath no effect, for the Traitor is by that freed from the immediate execution of the Sword: sure it is, that if the yielding be in *aperto pralio*, methinks absolute pardon is implicitly in the contract; however this is undeniable, that having yielded himself Prisoner of War, if he escape, he for ever loses the benefit of the promise. Nor are Hostages to be destroyed, according to that of *Scipio*, who said: *He would not shew his displeasure on harmless Hostages, but upon those that had revolted, and that he would not take revenge of the unarmed, but the armed Enemy.* 'Tis very true by the Law of Arms, if the Contract be broke for which they became Hostages, they may be slain, that is, the slayer is without punishment: but yet some conceive the slayer is not without sin, for that no such Contract can take away any mans life, that is, I suppose an Innocent's life; but without controversie, if those that become Hostage be or were before in the number of grievous Delinquents, or if afterwards he hath broken his Faith given by him in a great matter, the punishment of such may be free from injury.

XIX. Where offences are of that nature as they may seem worthy of death, as mutiny, and the like, &c. it will be a point of mercy, because of the multitude of them, to remit extreme right, according to that of *Seneca*: *The severity of a General shews it self against particulars, but pardon is necessary when the whole Army is revolting: what takes away anger from a wise man? the multitude of Transgressors.* Hence it was, that casting of * Lots was introduced that too many might not be subjected to punishment.

*tudine peccantium, severitas autem exercenda est in peccata paucorum. Vide Gailium de Pace publ. lib. 11. cap. 9. 36. * Vide Grot. lib. 3. cap. 11. §. 17.*

However all Nations have generally made it a standing Rule in the punishment of Mutineers, as near as possible, to hunt out the Authors, and make them examples †.

And therefore by the 15. Article, If any man at any time, when Service or Action is commanded, shall presume to stop or put backwards or discourage the said Service and Action, by pretence of Arrears of wages, or upon any pretence of wages whatsoever, they are to suffer death; and indeed the same ought to be without mercy,

Libertinum ingrat. in in pristinam redigit servitutem. Fortescue. cap. 45.

Liv. lib. 28. The same faith Julian in Nicetas.

Grotius de Jure Belli ac Pacis, lib. 3. cap. 11.

2 de Ira cap. 17. Quicquid multis peccatur inultum est. Magis monendo quam minando: sic enim agendum est cum multitudine.

† Videtur de Jure Belli, n. 55. lib. 2.

Arti. 15.

by how much the more they may raise a Mutiny at a time when there is nothing expected but Action, and the shewing the most obsequious duty that possibly may be; the breach of which may occasion the damage of the whole Fleet, and being of such dangerous consequence, ought severely to be punished. *Gustavus Adolphus* upon his first entrance into *Germany*, perceived how that many Women followed his Souldiers, some being their Wives, and some wanting nothing to make them so but Marriage, yet most passing for their Landresses, (though commonly defiling more than they wash) the King coming to a great River, after his Men and the Waggon were passed over, caused the Bridge to be broken down hoping so to be rid of these feminine impediments; but they on a sudden lift up a panick shriek which pierced the Skies, and the Souldiers hearts on the other side of the River, who instantly fell into mutiny, vowing not to stir a foot further except with Baggage, and that the Women might be fetched over, which was done accordingly; for the King finding this ill humour so generally dispersed in his men, that it was dangerous to purge it all at once, smiled out his anger for the present, and permitted what he could not amend. So likewise the uttering of any words of Sedition or Mutiny, or the endeavouring to make any mutinous Assemblies upon any pretence whatsoever, is made death: And the very Concealers of any traitorous and mutinous practices, designs or words, or any words spoken by any to the prejudice of His Majesty or Government, or any words, practices, or designs tending to the hindrance of the Service, and shall not repeat them, subject them to such pains and punishments as a Court Marshal shall think fit. And whereas in any of the offences committed against any of the Articles for the Government of any of His Majesties Ships of War, within the narrow Seas, wherein the pains of death are to be inflicted, execution of such Sentence ought not to be made without leave of the Lord Admiral; this of Mutiny is totally excepted, for such may be executed immediately.

XX. It is not lawful for Princes or States to make of their Enemies Traitors, or cause them to desert the Service of their Prince, or to bring over their Ships, Ordnance, Provisions or Arms; for as it is not lawful for any

Subject

Artic. 19.

Artic. 34.

Artic. 20.

Grotius de Jure
Bellæ ac Pacis,
l. 3. c. 1. §.

Subject to do the same, so neither to tempt him; for he that gives a cause of sinning to another, sins also himself; but if a man will voluntarily without any other impulse than his own, bring over the Ships or Armies, or deserts the Service of his Prince to serve another, this, though a fault in the deserter, is not in the receiver: *We receive a Fugitive by the Law of War* (saith * *Celsus*) *that is, it is not against the Law of War to admit him, who having deserted his Princes part, elected his Enemies*; nor are such to be rewarded, except it shall be agreed, as in the Peace of † *Lewis* the Eleventh. However such sort of Gamesters, if caught, are to be severely punished; and therefore it is provided, That if any Sea Captain, Officer, or Seaman shall betray his trust, or turn to the Enemy, Pirate or Rebel, or run away with their Ship or Ordnance, Ammunition or Provision, to the weakening of the Service, or yield the same up to the Enemy, Pirate or Rebel, they shall be punished with death; so likewise, If any shall desert the Service or the Employment, which they are in on Shipboard, or shall run away or entice any other so to do, they are subject to the like pain of death. And by the Law of Nations, such deserters that run away from their Colours or Fleet before Peace proclaimed and concluded, all persons of that Prince from whom they fled, have a right indulged to them to execute publick revenge.

* *Leg. Transfug.*
D. de acqu. dom.
Polyb in excerp.
Legat. 9. 28. 34.
Menard. Prote.
Nor idem nas
docet.

† *Phil. Comin.*
lib. 4. cap. 12.

Artic. 16.

Artic. 17.

Tertull. Apolog.
9. c. quando liceat, l. 2. in reus
majestatis &
publicos hostes
omnis homo mi-

les. Vide Grot. lib. 1. cap. 5. Vide Hestley Rep. 235. 1 H. 7. cap. 1. 3 H. 8. cap. 5.

Liv. l. 2 c. 3.
§. ult. ad Leg.
Corn. de Sicar.
pun.

Artic. 18.

XXI. By the Laws of Nations, Spies may be sent to view and survey the Enemies Force, Fleet, station, and make discovery of whatsoever may give advantage to the persons sending, as is mentioned above; but being apprehended they are put to death; and therefore it any person shall come from or be found in the nature of Spies, to bring any seducing Letters or Messages from any Enemy or Rebel, or shall attempt or endeavour to corrupt any Captain, Officer, Mariner, or other of the Navy or Fleet, to betray his or their trust, or yield up any Ship or Ammunition, or turn to the Enemy or Rebel, he shall be punished with death.

XXII. Souldiers and Mariners owe all respect and duty to their Superior Officers; and therefore when they are in anger, they ought to avoid them; but above all not to

* *Leg. milit. D.
de re milit. Ru-
fus Leg. militar.
cap. 15.*

† *Artic. 21.*

quarrel with, or give them any provoking language: and therefore by the Law of Arms, a Souldier who hath resisted his Captain, willing to chastise him, if he hath laid hold on his Rod, is cashier'd, if he purposely break it, or laid violent hands upon his Captain, he dies: * And by the Laws of *England*, if any person shall presume to quarrel with his Superior Officer, he shall suffer severe punishment; and if he strikes him shall suffer death, or otherwise as a *Court Marshal* shall adjudge the matter to deserve †.

*Bacon's Maxim
fol. 17. Privi-
legium non va-
let contra rem-
publicam.*

Artic. 22.

XXIII. And though Mariners and Souldiers may have just cause of complaint, as that their victuals or provisions are not good, yet must they not mutiny or rebel, whereby to distract or confound the whole Crew, but must make a civil and humble address to their Commander, that the same may be amended; and if the case be such, that the Commander cannot redress the same, by going to Port to supply the exigencies, without detriment of the Fleet (as if ready to engage, or the like) they must like Men and Souldiers bear with the extremity, considering that it is better that some men should perish, nay, the whole Crew in one Ship, than the whole Fleet; nay, perhaps the whole Kingdom be destroyed: And therefore if any in the Fleet find cause of complaint of the untobolsomness of his Victuals, or upon other just ground, he shall quietly make the same known to his Superior, or Captain, or Commander in Chief, as the occasion may deserve, that such present remedy may be had, as the matter may require; and the said Superior or Commander is to cause the same to be presently remedied accordingly; but no person upon any such or other pretence shall privately attempt to stir up any disturbance, upon pain of such severe punishment, as a *Court Marshal* shall think fit to inflict.

Artic. 24.

XXIV. And as the Law doth provide that there be no waste or spoil of the Kings provision, or imbezlement of the same; so likewise that care be taken, the Ships of War neither through negligence or wilfulness be stranded, split or hazarded, upon severe penalties. In Fights and when great Fleets are out, there are generally instructions appointed for all *Masters, Pilots, Keetches, Hovyes, and Smacks*, who are to attend the Fleet, and to give them notice

notice of the Roads, Coasts, Sands, Rocks, and the like, and they have particular stations allotted them, and Orders given, that if they shall find less water than such a proportion, they then give a signal as they are directed to give, and continue their signal till they are answered from the Capital Ships.

But in time of Fight they generally lay away their head from the Fleet, and keep their lead; and if they meet with such a proportion of water as is within their directions, they are to give such signal as they receive Orders for, and stand off from the danger; but the wilful burning of any Ship or Magazine-store of Powder, Ship-boat, Betch, Hop or Cessel, or Tackle or Furniture thereunto belonging, not appertaining to an Enemy or Rebel, shall be punished with death. *Artic. 27.*

XXV. There are other faults often committed by the Crew, the which the Law does punish, as a quarrelling on Ship board, using provoking speeches tending to make quarrel or disturbance^a, Murthers, wilful killing of any Man^b, Robbery, Theft^c, and the unnatural sin of Sodomy and Buggery, committed with Man or Beast: all which, and all other faults and misdemeanours are punished with death, or according to the Laws and Customs in such cases used at Sea; and when any persons have committed any of the offences particularly mentioned in the Statute of 13 Car. 2. Cap. 9. and contained in the Articles or any others, and for the which they shall be committed, the Probosc Marshal is to take them into custody, and not suffer them to escape, and all Officers and Seamen are to be aiding and assisting to Officers for the detecting and apprehending of offenders. *Artic. 23.*
Artic. 28.
Artic. 29.
Artic. 33.
Artic. 31.

Touching the punishments that the Roman Generals used to their Souldiers, when they were at a Court Marshal found faulty, they were commonly proportioned according to the offence committed: Sometimes they were easie, of which sort were those which only branded the Souldier with disgrace; others were those that came heavy on the Person or Body. To the first belonged a shameful discharging or cashiering a Mariner or Souldier from the Army, *Ignominiosa dimissio.* and generally lookt on as a matter of great disgrace, which punishment remains at this day for offences as well in England, as in most parts. A second was by stopping of their Pay;

*Fraudat. stipen-
dii. Rosin. Ant.
Rom. l. 10. c. 25.*

Censio Hastaria.

*Godwin Antiq.
Rom. fol. 127.*

*Lips. de milit.
Rom. lib. 5.
Dialog. 18.*

Pay; such Souldiers which suffered this kind of mulct, were said to be *Ere diruti*, for that *Es illud diruebatur in fiscum, non in Militis sacculum*; the which is and may at this day be inflicted, especially on such as shall wilfully spoil their Arms, and for the like sort of offences. A third was a Sentence enjoyned on a Souldier to resign up his Spear; for as those which had atchieved any Noble Act, were for their greater Honour *Hasta pura donati*, so others for their greater disgrace were inforced to resign up that Military Weapon of Honour. A fourth sort of punishment was, that the whole Cohort, which had lost their Banners or Standards, either in the Fields or at Sea, were inforced to eat nothing but Barley-bread, being deprived of their allowance in Wheat, and every Centurion in that Cohort had his Souldiers Belt or Girdle taken from him, which was no less disgrace among them than the degrading (among us) one of the *Order of the Garter*: for petty faults they generally made them stand bare-footed before the *General's Pavilion*, with long Poles of ten foot in length in their hands, and sometimes in the sight of the other Souldiers to walk up and down with Turffs on their necks, and sometimes carrying a Beam like a Fork upon their shoulders round the Town. The last of their punishments was, the opening of a Vein or letting them blood in one of their arms, which generally was inflicted on them who were too hot and bold.

The great Judgments, were to be beaten with Rods, which was generally inflicted on those who had not discharged their Office, in the sending about that *Table* called *Tessera*, wherein the Watch-word was written, or those who had stolln any thing from the Camp, or that had forsaken to keep Watch, or those that had born any false Witness against their Fellows, or had abused their bodies by Women, or those that had been punished thrice for the same fault, sometimes they were sold for bond-slaves, beheaded and hanged. But the last which was in their mutinies, the punishment fell either to Lots, as the tenth, twentieth, and sometimes the hundredth man, who were punished with Cudgelling; and with these punishments those in *England* have a very near affinity, as cleansing the Ship, losing Pay, ducking in the Water, beaten at the Captains head, hoisted up the main Yard end with

with a shovel at their back, hanged, and shot to death, and the like.

XXVI. The *Admiral* may grant Commissions to inferior *Vice-Admirals* or *Commanders in Chief* of any Squadron of Ships, to assemble *Court Marshals*, consisting of *Commanders* and *Captains*, for the Tryal and Execution of any of the offences or misdemeanours which shall be committed at Sea; but if one be attainted before them, the same works no corruption of Blood or forfeiture of Lands, ^{37 H. 6. fol. 4. 5.} nor can they try any person that is not in actual Service and Pay in *His Majesties Fleet* and Ships of War. But in no case where there is Sentence of death can the execution of the same be without leave of the *Lord Admiral*, if the same be committed within the narrow Seas; yet this does not extend to mutiny, for there in that case the party may be executed presently. ^{13 Car. 2. cap. 9.}

All offences committed in any Voyage beyond the narrow Seas where Sentence of death shall be given upon any of the aforesaid offences, execution cannot be awarded nor done, but by the Order of the Commander in Chief of that Fleet or Squadron, wherein Sentence of death was passed.

XXVII. The Judge Advocate hath power given by the words of the *Statute*, to administer an Oath in order to the Examination or Tryal of any of the offences mentioned in the *Statute* of ^{13 Car. 2. Cap. 9.} and in his absence the *Court Marshal* hath power to appoint any other person to administer an Oath to the same purpose. This *Statute* enlarges not the power and jurisdiction of the *Admiral* any further than only to the above-mentioned offences in any case whatsoever, but leaves his authority as it was before the making of this *Statute*. Nor does it give the *Admiral* any other or further power to inquire and punish any of the above-mentioned offences, unless the same be done upon the main Sea, or in Ships or Vessels being and hovering in the main stream of great Rivers only beneath the Bridges of the same Rivers nigh to the Seas, within the Jurisdiction of the *Admiralty*, and in no other place ^{15 R. 2. cap. 3.} whatsoever.

XXVIII. As Souldiers and Mariners for the honour and safety of the Realm, do daily expose their lives and limbs, so the Realm hath likewise provided for them, in case they

Stat. 43 Eliz.
cap. 3.

they survive and should prove disabled or unfit for Service, a reasonable and comfortable maintenance to keep them; the which the Justices of the Peace have power yearly in their *Easter Sessions* to raise by way of a Tax, for a weekly relief of maimed Souldiers and Mariners.

The maimed Souldier or Mariner must repair to the *Treasurer* of the County where he was prest, if he be able to travel; if he be not, then to the *Treasurer* of the County where he was born, or where he last dwelt by the space of three years; but if he proves unable to travel, then to the *Treasurer* of the County where he lands.

He must have a Certificate under the chief Commander, or of his Captain, containing the particulars of his hurt and services.

The allowance to one not having been an Officer, is not to exceed ten pound *per annum*;

Under a Lieutenant ——— 15. }

A Lieutenant ——— 20. }

Till the Mariner arrives at his proper *Treasurer*, they are to be relieved from *Treasurer* to *Treasurer*, and when they are provided for, if any of them shall go a begging or counterfeit Certificates, they shall suffer as common Rogues, and lose their Pensions: Over and above this provision, *His Sacred Majesty* hath provided a further suppliment for his maimed Mariners and Souldiers disabled in the Service, which is issued out of the *Chest* at *Chatham*, and constantly and duly paid them; and for his Commanders, Officers, and others that served aboard, he, of his Royal Bounty, hath given to those that bear the character of War, and purchase the same by their fidelity and valour, a pious Bounty called *Smart-Money*, over and above their Pay; and laid the Foundation of an *Hospital* at *Chelsea*, in his life time, which his now Sacred Majesty hath compleated, and Endowed, both for Beauty and Magnificence, excelling all in *Christendom*.

The greatest assurance of a Fleet is in the prudent Government of the *Admiral*; the greatest weakening of it is by discontent, which generally proceeds from two things, want of good Victuals at Sea, and Pay when come home, these are the poor Mariners *Aqua vita*; but want of them is such an *Aqua fortis* as eats through all manner of duty and obedience: that Prince that expects to be well served

ved and obeyed, (especially by an *English* man) must take care that he suffer not a greater power in his Fleet than his own; this Commander is Necessity, which breaks discipline at Sea, and creates discouragement at Land.

XXIX. The wisdom of the *Romans* was mightily to be commended, in giving of *Triumphs* to their *Generals* after their return, of which they had various sorts; but the greatest was when the *General* rid in his Chariot, adorned and crowned with the Victorious Laurel, the *Senators* with the best of the *Romans* meeting him, his Souldiers (especially those who by their valour had purchased Coronets, Chains, and other Ensigns of reward for their conduct and courage) following him: but what alas! could these to the more sober represent any other but horror, since the centers from whence the lines were drawn, could afford nothing but death, slaughter, and desolation on those who had the souls and faces of men; and if it were possible, that that Blood which by their Commissions was drawn from the sides of Mankind, and for which they made those Triumphs, could have been brought to *Rome*, the same was capable of making of a Source great as their *Tiber*; but *Policy* had need of all its Stratagems to confound the Judgment of a Souldier by excessive Praises, Recompences and Triumphs, that so the opinion of Wounds and wooden Legs might raise in him a greater esteem of himself, than if he had an entire body. To allure others, something also must be found out handsomely to cover wounds and affrightments of death; and without this *Cesar* in his Triumph, with all his Garlands and Musick, would look but like a Victim; but what sorrow of heart is it to see passionate man, a ray of Divinity. and the joy of Angels, scourged thus with his own Scorpions? and so fondly to give himself Alarms in the midst of his innocent contentments, as they of *Holland* but yesterday in the midst of their Traffick and Recreations did (by the denying *His Sacred Majesty* his Right, even that Right of the Flag which his Ancestors had with so much Glory acquired) pull on their heads a War, which that mighty *Republick* by their greatest industry and wisdom could not in the Revolution of almost eight years be able to quell. The cholerickness of War (whereby

*Vide Salmuth.
in Pancir. Leg.
rerum deprod.
Ca. de Triumph.
Dion. Halicar-
nas. lib. 5.*

Of the Rabal Military part.

(whereby the lustful heat of so many hearts is reduced) stirs up the Lees of *Kingdoms* and *States*, as a Tempest doth weeds and slimy sediment from the bottom to the top of the Sea, which afterwards driven to the shore, together with its foam, there covers Pearls and precious Stones: and though the Cannon should seem mad by its continual firing, and the Sword reaking hot by its daily slaughters, yet no good man doubts but they, even they, shall weather out those storms, and in the midst of those merciless instruments find an *inculcata Tutela*, who love Justice, exercise Charity, and put their trust in the *Great Governour of all things*.

CHAP.

C H A P. XIV.

Of Salutations by Ships of War, and Merchant Men.

- I. Of Salutation, how esteemed by some in this latter Age.
- II. Of the same paid in all Ages as an undoubted mark of Sovereignty of this Empire.
- III. Of those Seas where this Right is to be paid to the King of England's Flag.
- IV. In what manner the King of England holds this Right, and by whom to be paid.
- V. Of those that shall neglect or refuse to do the same, how punish'd and dealt withal.
- VI. Where His Majesty of Great Britain's Ships are to strike their Flag, and where not.
- VII. Of the saluting of Ports, Castles, Forts, how the same is to be done, and on what terms.
- VIII. Of Ships of War their saluting their Admiral and Commanders in Chief.
- IX. Of Ambassadors, Dukes, Noblemen, and other Persons of Quality, how to be saluted coming aboard and landing.
- X. The Admiral of any Foreign Nation, if met withal, how to be saluted and answered.
- XI. Of the Men of War or Ships of Trade of any Foreign Nations, saluting His Majesty's Ships of War, how to be answered.
- XII. Of the saluting of His Majesty's own Forts and Castles, and when the Salute ceases.
- XIII. Of the objection that seems to be made against the necessity of such Salutations.
- XIV. Why Kingdoms and States attribute the effects, not the cause of Rights, to prescription.
- XV. That Kingdoms and Republicks ought not to be disordered for the defect of Right, in presumption, and the objection in the XIII. §. answered.
- XVI. The inconveniency of War, and the causes justifying the same.
- XVII. Of the causes not justifiable in War.
- XVIII. Of Moderation, and the utility of Faith and Peace.

I. **A**S reforming Powers in all Ages have made it their chiefest work to take down the great *Colossuses*, and whatever else might be obumbragious in the excrescences of Civil Pomp; so we had some in this Age, who, by a new Art of levelling, thought nothing could be rightly mended, and they planted, unless the whole piece ravelled out to the very end, and that all intermediate greatness between Kings and them, should be crumbled even to the dust, where all lying level together as in the first Chaos, Spades ought even to be put into the hands of those

those who were heretofore adorned with Scepters, all outward tokens of honour and esteem, which even from the first institution of Society seemed by an uninterrupted stream to be continued down to Posterity, (even amongst the most barbarous Nations) was by them totally denied; the Hand, the Hat, the Knee (being no other but outward signs of an inward respect) being esteemed equal with Idolatry; but that unhappy brood, to whom whatsoever was crooked seemed straight, and what was dark to them appeared light, are now not to be accounted men, with whom the question may admit of a debate whether *Salutation* is innocent, necessary, and praise-worthy, since nothing of reason can be found in the foundation of their Religion, Honesty, or Conscience, — Therefore this Discourse is directed to men.

II. First, it is evident by what hath been said, that the *British Seas* before the *Roman Conquest*, ever belonged to the *Isle of Great Britain*, they always claiming and enjoying the sole Dominion and Sovereignty of the same, which afterwards accrued to the *Romans* by Conquest, and from them translated with *Its Empire* to the succeeding *Saxon, Danish, and Norman Kings*, and in the Reigns of those Princes there were always some marks of Sovereignty paid, wherein the right of the same was evinc'd and acknowledged.

III. Now those Seas in which this Salutation or Duty of the Flag are to be paid, are the four circumjacent Seas, in which all Vessels whatsoever are to pay that Duty, according to the Custom of the same, and the Ordinance of King *John*. How far this Right is payable, appears in the fourth Article in the Peace made lately between His Majesty and the *States General of the United Provinces*, in these words:

— That whatever Ships or Vessels belonging to the said United Provinces, whether Vessels of War or other, whether single or in Fleets, shall meet in any of the Seas from Cape Finisterre the middle point of the Land Van Staten in Norway, with any Ships or Vessels belonging to his Majesty of Great Britain, whether those Ships be single or in great number, if they carry his Majesty of Great Britain's Flag or Jack, the aforesaid Dutch Vessels or Ships shall strike their Flag and lower their
 Top.

Top-sail, in the same manner, and with as much respect as hath at any time, or in any place, been formerly practised towards any Ships of his Majesty of Great Britain, or his Predecessors, by any Ships of the States General, or their Predecessors.

IV. Now, his Majesty holds not this *Salutation* or Respect, by virtue of the League or of the Article, but as the same is a RIGHT inherent to the *Empire of Great Britain*; and therefore in the first part of the Article it is declared in these words:

— That the aforesaid States General of the United Provinces, in due acknowledgment on their part of the King of Great Britain's *RIGHT* to have his Flag respected in the Seas hereafter mentioned, shall and do declare, and agree. —

Now this Right extends and subjects all Nations whatsoever that shall pass through those Seas, and between those places meeting with any of his *Majesties* Ships of War, bearing his Flag, Jack, or Cognizance of Service, to strike their Top-sail, and take in their Flag in acknowledgment of his *Majesties* Sovereignty in those Seas; and if any shall refuse to do it. or offer to resist, they may be compelled *vi, manu & forti*, for his *Majesties* Honour is by no means to receive the least diminution.

*Selden Mare
Claus. lib. 2.
cap. 24.*

V. If therefore any of his *Majesties* Subjects should be so negligent or forgetful to pay that obedience, when it may be done without loss of the Voyage, they are to be seized on, and brought to the Flag, to answer the contempt, or else the *Commander* may remit the Name of the Ship, *Commander* or *Master*, as also the place from whence, and the Port to which she shall be bound, to the *Admiral*; however before she is dismissed, she must pay the charge of the *shot* that her negligence or forgetfulness occasioned, and afterwards may be indicted for the same, and severely punished.

VI. In his *Majesties* Seas, none of his Ships of War are to strike to any; and in no other part is any Ship of his Majesty to strike her Flag or Top-sail to any Foraigner, unless such foraign Ship shall have first struck, or at the same time have struck her Flag or Top-sail to his *Majesties* Ships.

VII. But if any of the King of *England's* Ships of War,

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shall

shall enter into the Harbour of any Foreign Prince or State, or into the Road within shot of Cannon of some Fort or Castle, yet such respect must be paid, as is usually there expected, and then the *Commander* is to send ashore to inform himself what return they will make to his Salute; and that if he hath received good assurance, that his Majesties Ships shall be answered Gun for Gun, the Port is to be saluted, as is usual, but without assurance of being answered by an equal number of Guns, the Port is not to be saluted: And yet in that very respect before the Port is to be saluted, the Captain ought to inform himself, how Flags (of the same quality with that he carries) of other Princes have been saluted there, the which is peremptorily to be insisted on, to be saluted with as great respect and advantage as any Flag (of the same quality with the Captains) of any other Prince hath been saluted in that place.

VIII. A Captain of a Ship of the second Rate, being neither Admiral, Vice-Admiral, nor Reer-Admiral, at his first coming and saluting his Admiral or Commander in Chief, is to give eleven Pieces, his Vice-Admiral nine, and his Reer-Admiral seven, and the other proportionably less by two, according to their Ranks; but the Commander or Captain of a Ship is not to salute his Admiral or Commander in Chief, after he hath done it once, except he hath been absent from the Flag two months.

IX. When a Ship of the second Rate shall carry any Ambassadour, Duke, or Noblemen, at his coming aboard, he is to give eleven Pieces, and at his landing fifteen; and when he shall carry a Knight, Lady, or Gentleman of Quality, at their coming aboard he is to give seven, and at the landing eleven; and the other Ships are to give less by two, according to their Ranks and number of Ordnance.

X. When an Admiral of any Foreign Nation is met with, he is to be answered with the like number by all the Ships he shall salute; if a Vice-Admiral, the Admiral is to answer him with twelve less; but the Vice-Admiral and Reer-Admiral, and as many of the rest as he shall salute, shall give him the like number: if a Reer-Admiral, then the Admiral and Vice-Admiral to answer him with two less; but if he shall salute the Reer-Admiral.

Admiral or any other, they are to answer him in the like number.

XI. When a Man of War or Merchant-Man of another Nation, or of our own, salutes any of the King's Ships, he is to be answered by two less.

XII. When any of the Captains of his Majesties Ships shall have occasion to salute any of the King's Castles, he is to give two Guns less than they are directed to give upon saluting their Admiral or Commander in Chief, as aforesaid: But this extends only to time of Peace; for if War is begun, no Guns ought to be fired in Salutes, unless to the Ships or Castles of some Foreign Prince or State in amity.

XIII. Those duties or obligations being laid on Commanders, consist of two parts; the one is that ancient prescription, which the Crown of England claims by virtue of the Sovereignty of that Empire; the other is but that respect which is paid as visible marks of Honour and Esteem, either to Kingdoms or Persons publick or private, to whom these several Commands are to be observed; and yet in these which are both innocent and harmless of themselves, we want not those, who being empty of all that may be called good, want not malice to start up words, *Wherefore should the lives of men, even Christian men, be exposed to death and slaughter for shadows* (as they call them) *Right of Salutation* or Complement being no other in their opinion.

XIV. Admitting therefore that the evidence of original Compacts and Rights stand at such remote distances from us, that they are hardly discernable, and that the principle of Civil things, as well as Natural, is sought for in a Chaos or confusion; so that the evidence of ancient facts *vestigia nulla retrosum*, there being no infallible marks of their preexistence (one step doth so confound and obliterate another) and that time it self is but an imagination of our own, and intentional, not a real measure for actions, which pass away concomitantly with that measure of time in which they were done, for which reason we talk of ancient things, but as blind men do of colours: Notwithstanding prescription is supposed by most to hold out such an evidence, that as they say, it ought to silence all Counterpleas in all Tribunals, and by the present

Coke Comm. 1
on Littleton, 1
fol. 25.

present allowance which is indulged to it, it either proves a good or cleanses a vitiated Title; and hath this power in the Civil constitution of the World, that for quietness sake what it cannot find, we grant it a power to make.

*Deorum injuria
Dixi cur.*

And if we examine all this strictly at the two great Tribunals, the external and the internal, and argue the *Jus* of it, as Statesmen and Lawyers do, we can then raise the argument of it no higher in the external or temporal Court, than only this — *That it is very convenient it should have the effects of Right; lest properties and Dominion of things should be uncertain, and the apparent negligences of time: Owners should be punished, and Controversies have a speedy end: States looking more after public repose and quiet than after strict vertue; and more after those things which are ad alterum, than that which concerns a mans own self; for, say they, The Gods look well enough after their own injuries: States meddle not so much with great Prodigalities as in petty Larcenies, our chiefest Liberty, Priviledges, or Prerogative in this World, consisting only in an uncontrollable Right, which we have to undo our selves, if we please. Certainly if we plead at the other Tribunal, as conscientious Lawyers, we must give our ultimate resolution out of that Law, *Qua inciduntur non ere, sed animis*: which is not engraved in Tables of Brass, but in the Tables of our Souls; for the Rules of Law tell us, *Qua principio vitiantur, ex post facto reconwalescunt*, and that prescription or usu-caption (which is but the lapse of so much time) hath the power to make *Wrong a Right*; yea, to change the morality of an action, and turn quantity into quality: upon the result of all which taking for granted, what those stubborn people do hold, that instead of being a right, or a certain cause or proof of it, it only makes a shadow or an opinion of right.*

XV. And when we have taken those people by the hand, and with eagerness run with them to the very bottom and end of the line, and there find nothing, we are but in Pompey's astonishment, when after his Conquest of *Jerusalem*, having with such reverence and curiosity visited the *Sanctum Sanctorum*, and found nothing there but a pair of Candlesticks and a Chair, in
which

which there was no God sitting; yet for all this mistake, he would not (as *Josephus* saith) disorder or rob the Temple, which he took by force of Arms, because *the very opinion of Religion hath something of Religion*; (which made *Jacob* accept of *Laban's* Oath by an *Idol*) so ought not we for defect of giving the causes of the inception of Prescription, or of the Right in Prescription disorder a State, or be the occasion of setting of two Nations at enmity; nay, though in conscience we are satisfied that it contains but the opinion or shadow of Right: And as to the involving the lives of the innocent, there is no such thing in the matter, for there is not required any thing which they do not owe, nor are they designed to death; but if the cause be such, that they that are innocent must perish, that is, be exposed to death by their Rulers, because they obstinately will not yield that which is right, but will involve the lives of their innocent Subjects by force, to defend that which is wrong, such guilty Governours must answer for the defect of their own evil actions: on the other hand, there can be no doubt made, but he that hath an undoubted right, being a Sovereign, the Subjects partake in the same, and the indignity offered to him, they immediately become partakers in the suffering, for the satisfaction of which they may, yea, are obliged both by the Law of God and Nations to seek reparation (if their Prince shall command) *vi, manu & forti*, by the hazard of their blood and lives.

*Machiavel's
Discourses,
cap. 11.*

XVI. On the other hand, as War introduces the greatest of evils, *viz.* the taking away of mens lives, and that which is equivalent to life; so right Reason and Equity tells us, that it ought not to be undertaken without the greatest cause, which is the keeping of our lives, and that without which our lives cannot be kept; or if they should be kept, yet they would not be of any value to us, seeing there may be a life worse than death, even Captivity; wherefore as we are forbidden to go to Law for a little occasion, so we are not to go to War but for the greatest. Now those things that are equivalent to a mans life, are such to whom *Almighty God* appointed the same equal punishment as to murderers, and such were breakers into Houses, breakers of Marriage-fidelity, Publishers of false Religion, and those who rage in unnatural lusts, and the like.

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However, before mens Persons or Goods are to be invaded by War, one of these three conditions is requisite.

1. Necessity, according to the tacite contract in the first dividing of Goods, as hath been already oblerved.

2. A Debt.

3. A mans ill merits, as when he doth great wrong, or takes part with those who do it.

Against which if any thing is committed, War may be commenc'd, nor is the same repugnant to the Laws of Nature; that is, whether the thing may be done not unjustly, which hath a necessary repugnance to the rational and social Nature; among the first Principles of Nature, there is nothing repugnant unto War; on the other hand there is much in favour of it, for both the end of War, the conservation of Life and Members, and the keeping and acquiring of things useful unto life is most agreeable to those principles: and if need be, to use force to that purpose is not disagreeable, since every Living thing hath by the gift of Nature strength, to the end it may be able to help and defend it self. Besides, Reason and the nature of Society inhibits not all force, but that which is repugnant to Society, that is, which depriveth another of his right; for the end of Society is, that every one may enjoy his own; this ought to be and would have been, though the Dominion and Property of Possessions had not been introduced, for Life, Members, and Liberty, would yet be proper to every one; and therefore without injury could not be invaded by another: to make use of what is common, and spend as much as suffices Nature, would be the right of the Occupant, which right none could without injury take away. And this is proved by that Battle of *Abraham* with the four Kings, who took Arms without any Commission from GOD, and yet was approved by him; therefore the Law of Nature was his Warrant, whose Wisdom was no less eminent than his Sanctity, even by the report of *Heathens*, *Berosus* and *Orpheus*; nor is the same repugnant to the *Hebrew Law* or *Gospel*, as the same is most excellently proved by the *Incomparable Grotius* *.

XVII. On the other hand, the fear of uncertain danger; as building of Forts, Castles, and Ships, and the like, though the former be on Frontiers, the refusing of Wives
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*Ulpian Leg. 1.
Sed. vim vi.
D. de vi, & vi
arma.*

** de Jure Belli
ac Pacis, lib. 1.
cap. 1.*

(when others may be had) the changing of Countries either barren or Morish for more fertile or healthful, which may justly be done: as in the case of the Old *Germans*, as *Tacitus* relates: so likewise to pretend a Title to a Land, because it was never found out or heard of before, that is, if the same be held by a People that are under a Government; nay, though the Government be wicked or think amiss of GOD, or be of a dull wit; for invention is of those things that belong to none; for neither is Moral Virtue, or Religious, or Perfection of Understanding required to Dominion; but yet if a new Place or Land shall be discovered, in which are People altogether destitute of the use of Reason, such have no Dominion, but out of Charity only is due unto them what is necessary for life; for such are accounted as Infants or Mad-men, whose right or property is transferred, that is, the use of the same, according to the Laws of Nations; in such cases a charitable War may be commenc'd.

*Viñor. de Ind.
rel. 1. n. 31.*

*Viñor. de Jure
Belli n. 5, 6, 7, 8*

XVIII. To prevent all the sad calamities that must inevitably follow the ungoverned hand in War, Faith must by all means be laboured for; for by that, not only every Commonwealth is conserved, but also that greater Society even of Nations, that once being taken away, then farewell Commerce, for that must be then taken away from man; for Faith is the most Sacred thing that is seated in the breast of man, and is so much more religiously to be kept by the Supreme Rulers of the World, by how much more they are exempted from the punishment of their sins here than other men: take away Faith, and then man to man would be (as Mr. *Hobbs* observes) even Wolves; and the more are Kings to embrace it, first for Conscience, and then for Faith and Credit sake, upon which depends the Authority of their Government. The Ambassadors of *Justinian* addressed their Speech to *Chosroes* after this manner: Did we not see you here with our own eyes, and pronounce those words in your ears, we should never have believed that *Chosroes* the Son of *Cabades*, would bring his Army, and enter forceably into the Roman bounds, contrary to his League, the only hope left to those that are afflicted with War; for what is this, but to change the life of men into the life of wild beasts? Take away Leagues, and there will be eternal Wars, and Wars without end will have this effect, to

*Procopius Per-
sic. 2.*

put

Of Salutations.

put men besides themselves, and divest them of their Nature. If then a safe Peace may be had, it is well worth the releasing of all or many of the injuries, losses, and charges, according to that in *Aristotle*: *Better it is to yield some of our goods to those that are more potent, than contend with them, and lose all*; for the common chances of War must be considered, which if so, the scope of the principal part of this First Book may be avoided, and we let into the peaceable tract of Traffick and Commerce.

The End of the First Book.

BOOK

BOOK II.

CHAP. I.

Of the various Rights and Obligations of Owners and Partners of Ships in Cases private.

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| <p>I. Of Navigation in general.</p> <p>II. Of Owners their several powers over those Vessels they are Partners in.</p> <p>III. Where Ships are obliged to make a Voyage before they can be sold; and what may be done when part protest against a Voyage.</p> <p>IV. The Master how brought in by the Owners, and the reason why in such a manner.</p> <p>V. where the Owners ought to be repaired for the Damages of the Master.</p> <p>VI. Where Ships broke in pieces determine the Partnership as to the Vessel, and where not.</p> <p>VII. Where a Ship shall be the Builders, and where only his whose Materials she was erected with.</p> | <p>VIII. Where Property of the Vessel altered changes not that of the Boat.</p> <p>IX. A Ship for the act of Piracy becomes forfeited; yet if bona fide sold, where the Property may be questioned.</p> <p>X. Monies borrowed by the Master, where the same obliges the Owners, and where not.</p> <p>XI. Where he that obtains an unlawful possession of a Ship, shall answer the full Freight to the Owners.</p> <p>XII. And where the Owners shall have their Freight, though they lose their Lading.</p> <p>XIII. Where a Ship may become a Deadland, and where not.</p> <p>XIV. How recoverable by the Laws of England.</p> |
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I N the precedent Book having observed something of the Rights of Persons and of Things in a state of Nature, and how necessarily they came at first to be appropriated, and how equitably they are now continued in the possession of those to whom they are consigned by the donation of others, by the Laws of Nations, and maintained or destroyed by the equity of those various Laws which rules and governs them in reference to matters publick, all which is justified by the Scripture it self: It may not now seem improper to examine the private causes changing the same, and of the contingencies and advantages

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tages that wait on that which we properly call Commerce.

The Great Creator having finished his Mighty Work, and given Man that Dominion which he now enjoys as well over the Fish in the Seas, as the Beasts in the Field, he was not forgetful of bestowing on him those things which were necessary for the government and support of the same, creating at the same time Trees which grow as it were spontaneously into Vessels and Canoes, which wanted nothing but launching forth to render them useful for his accommodation, which afterwards he by his Divine Genius (inspired by that Mighty One) finding Materials, hath since so compleated and equipt, as to render it the most beautiful and stupendious Creature (not improperly so called) that the whole World can produce, which being not retarded by lett of Winds, or other contingent accidents, submits it self to plow the unknown paths of that vast Element, to brave all Encounters of Waves and Rocks, to fathom and survey the vast immensities of the very World it self, to people, cultivate, and civilize uninhabited and Barbarous Regions, and to proclaim to the Universe the Wonders of the *Architect*, the Skill of the *Pilot*, and above all the Benefits of *Commerce*; so that it is no wonder at this day to find Nations contending who should surpass each other in the Art of Navigation, and to monopolize, if possible, the very Commerce and Trade of the World into their hands; and that, all by the means of this most excellent Fabrick.

*Aretin. post Jo-
an. Faber. in S.
item exercitor.
num. 3. Inst. de
oblig. quæ ex
quasi delict.*

II. Hence it is, that Ships and Vessels of that kind being originally invented for use and profit, not for pleasure and delight, to plow the Seas, not to lie by the Walls, to supply those of the Mountains as well as those on the Sea Coasts.

Therefore upon any probable design the major part of the Owners may even *against the consent*, though not without the *privity* and knowledge of the rest, freight out their Vessel to Sea.

It it should so fall out that the major part *protest* against the Voyage, and but one left that is for the Voyage, yet the same may be effected by that party, especially if there be *equality* in Partnership.

III. Owners by Law can no ways be obliged to continue their passion or partnership without fundering; but yet if they will funder, the *Law Marine* requires some considerations to be performed before they can so do. And therefore if the Ship be newly built, and never yet made a Voyage, or is newly bought, she ought to be subject to one Voyage upon the common out-read and hazard, before any of the Owners shall be heard to funder and discharge their parts; but by the Laws of *England* the Owners may before any such Voyage, sell or transmit their Right.

Leg. Fin. C. 5: pro Societ. poss. inst. & D. eod.

Leg. in hoc par. rag. si conveniat pro Soc.

If it falls out that one is so obstinate that his consent cannot be had, yet the Law will enforce him either to hold, or to sell his proportion; but if he will set no price, the rest may out-rigg her at their own costs and charges, and whatsoever Freight she earns, he is not to have any share or benefit in the same. But if such Vessel happens to miscarry or be cast away, the rest must answer him his part or proportion in the Vessel.

Bart. & Paul. in Leg. hac diffinitio §. cum fundum ff. locat.

Such Vessels when freighted out against the grain of

some of the Part-Owners, the same is under such Provifocs, Cautions and Limitations as the Law in that case requires.

But if it should fall out that the major part of the Owners refuse to set out the Vessel to Sea, there by reason of the unequality they may not be compelled; but then such Vessel is to be valued and sold: The like where part of the Owners become deficient or unable to set her forth to Sea.

Gloss. Leg. fin. vis & juris in Leg. atiq. para. culpa de rei undic. & Leg. arboribus. §. navis de usufruct.

IV. The Master of the Vessel is eligible by the Part-Owners in proportion, not by the majority, and he that is most able is to be preferred. The Wisdom of the later Ages have been such, that few have gone out in that condition, but those that have commonly had shares or parts in the same Vessel. In the preferring therefore of a Master, his ability and honesty is to be considered, since on him rests the charge not only of the Vessel, but of the Lading; their very actions subjecting the Owners to answer for all damage that shall be sustained by him or his Mariners, be it in the Port or at Sea, to the Lading or Goods of the Merchants or Laders, and they are made liable as well by the Common Laws * of *England*, as the Law † *Marine*.

Leg. non aliter F. de usu & habi.

18 H. 3. n. 53.

† *Coke 4. Instit. 146.*

* *Hill. 23 Car. 2. B. R. Morse versus Slue.*

† *Nautic. Carp. Stab. Leg. 1. Sect. 3.*

V. If the Master commits offences either negligently or wilfully, he shall be responsible over to his Owners for the reparation of damage; nor are they bound to joyn, but may sever and sue apart as well by the *Common Law* * as the *Marine*: So likewise if the Ship hath earned Freight, and part of them receive their parts, the rest may bring their Action for their share without joyning with the others.

* *Hill. 26, 27.*
Car. 2 in B.R.
Stanley versus
Ayles.

Leg. inter stipulantem in §.
Sacram. ff. de ver. oblig.

Leg. quod in §.
fin. F. de Leg.

Leg. Musius ff.
de rei venatic.

ff. lib. 6. tit. 1.
leg. 61.

Leg. si ex meis.
ff. de acq. rer. dom. & Leg. si convenerit §. si quis sic. ff. de pign. act.

Leg. M. velleus in §. armamentis. ff. de rei vendicat.

† *Tin. 3 Jac.*
B. R. Follis 1.
part, Abridg. fol. 530.

Bald. in Leg. cum proponas Cod. de Nautic. è favore, num. 6.

VI. If a Ship be broken up or taken in pieces, with an intent to convert the same to other uses; if afterwards upon advice or change of mind, she be rebuilt with the same Materials, yet this is now another, and not the same Ship, especially if the Keel be ript up or changed, and the whole Ship be once all taken asunder and rebuilt, there determines the Partnership *quoad* as to the Ship. But if a Ship be ript up in parts, and taken asunder in parts and repaired in parts, yet she remains still the same Vessel and not another; nay though she hath been so often repaired that there remains not one stick of the original Fabrick.

VII. If a man shall repair his Ship with Plank or other Materials belonging to another, yet the Ship maintains and keeps her first Owners.

But if a man shall take Plank and Materials belonging to another, and prepared for the use of shipping, and with them build a Ship, the property of the Vessel follows the Owners of the Materials and not the Builder.

But if a man cuts down the Trees of another, or takes Timber or Planks prepared for the erecting or repairing of a dwelling House; nay though some of them are for shipping, and buiids a Ship, the property follows not the Owners but the Builders.

VIII. If a Ship be sold together with her Tackle, Furniture, Apparel, and all other her Instruments thereunto belonging, yet by those words the Ships Boat is not conveyed, but that remains still in the Owners; so it is if the Ship be freighted out, and afterwards at Sea she commits Piracy: the Ship is forfeited, but the Boat remains still to the Owners †.

And though Ballast is generally used in shipping by those Ships that are freighted outwards, in order to bring-
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ing home of Goods, yet is not the same any part of the Furniture of the Vessel, and so it was adjudged in debt on Bond, the Condition was, that whereas the Plaintiff had bought of the Defendant a Ship, if the Plaintiff shall enjoy the said Ship with all the Furniture belonging to the same, without being disturbed for the Ship or any Furniture appertaining to it, that then, &c. and the case fell out to be, that after the sale of a Ship, a stranger sued the Plaintiff for certain monies due for Ballast bought by the Defendant for the same Ship, in which Suit he obtained sentence, upon which the Ship was seized, the Question was, If Ballast be Furniture for a Ship or not, it was resolved that it was not; for though it may be as necessary as Sails, yet it is not always so, for sometimes they sail without Ballast, for the Merchandize it self may be sufficient to answer that purpose.

*Mich. 29. Eliz.
in C. B.
Linter's Case,
Leon. 46, 47.*

IX. If a Ship commits a Piracy, by reason of which she becomes forfeited, if before seizure she be *Bona fide* sold, the property shall not be questioned, nor the Owners divested of the same.

*Mich. 13 Jac.
in B. R. Sir Rich.
Bingley's Case.
Rolls Abridg.
fol. 530.*

X. If a Master shall take up Monies to mend or victual his Ship where there is no occasion, (though generally the Owners shall answer the fact of the Master) yet here they shall not, but only the Master. But if there were cause of mending the Ship, though the Master spend the Money another way, yet the Owner and Ship become liable to the satisfaction of the Creditor; for it were very unreasonable that the Creditor should be bound to take upon him the care of repairing the Ship, and supply the Owners room, which must be so, if it should be necessary for him, to prove that the money was laid out upon the Ship; so on the other hand, it stands with reason that he be sure that he lends his money on such an occasion, as whereby the Masters fact may oblige the Owners, which he cannot do otherwise, unless he knows that the money borrowed was necessary for the repair of the Ship; and therefore if the Ship wanted some repairs, and a far greater and more extravagant sum was lent than was needful, the Owners shall not be liable for the whole.

*Dig. lib. 14.
tit. 1. §. 17.*

*Bridgeman's
Case, Hbart,
fol. 10, 11.*

XI. If a man gets possession of a Ship having no Title to the same, by the Law Marine, he shall answer such damage

*Gliff. African.
super. end. leg.
& S.*

*Dig. lib. 6. tit.
1. 62 & lib. 7.*

tit. 1 12. §. 1. & Papien on the same Law.

as the Ship in all probability might have earned ; and the reason of that is, because the only end of Shipping, is the imployment thereof: but if a warrant be directed out of the *Admiralty* to the *Marshal* of the same Ship to arrest such a Ship and *Salvo custodire*, who by force of the same enters into the same Ship, though the Warrant does not mention that the Officer should carry away the Sails of the same Ship, yet he may justify the taking the same, for that he cannot *Salvo custodire* the same Ship, unless he carries away the Sails.

Mich. 2 Car. in B. R. Creamer versus Jockley, Latch. fol. 188.

Digest lib. 19. tit. 2. 61. Scævola on the same Law.

XII. A Ship is freighted out, accordingly she receives in her Lading pursuant to agreement, afterwards an Embargo happens, and the Lading is taken as forfeited, yet the Owners shall notwithstanding receive Freight, for here is no fault in them, but only in the Merchant.

3. Instit. fol. 58.

XIII. In *Aqua dulci* a Ship may become a Deodand, but in the Sea, or in *Aqua salsa*, being an Arm of the Sea, though it be in the body of the County, yet there can be no Deodand of the Ship or any part of it, though any body be drowned out of it, or otherwise come by their death in the Ship, because on such waters, Ships and other Vessels are subject to such dangers upon the raging waves in respect of Wind and Tempest ; and this diversity all our ancient Lawyers do agree in, and it does more especially appear in the Parliament Rolls, where upon a Petition it was desired, *That if it should happen that any Man or Boy should be drowned by a fall out of any Ship, Boat, or Vessel, they should be no Deodands* : Whereupon the King by great advice with his Judges and Council learned in the Laws, made answer, *The Ship, Boat, or Vessel, being upon the Sea, should be adjudged no Deodand, but being upon a fresh River it should be a Deodand* — but the King will shew favour. There are abundance of other Petitions upon the like occasion in Parliament.

Rot. Parliam. 51 Ed. 3. num. 73. 1 R. 2. n. 106 4. R. 2. n. 33. 1 H. 5. n. 35.

A Ship lying at *Redrith* in the County of *Kent* near the shore to be carend and made clean, it happened that one of the Shipwrights being at work under her at low Water, the Vessel (then leaning aside) fortun'd to turn over the contrary side, by means of which the Shipwright was killed : Upon a Tryal at Bar, where the Question was, Whether this Deodand did belong to the Earl of *Salisbury*, who was Lord of the Mannor, lying contiguous to the place

Mich. 25 Car. 2. in B. R.

place where the Man was slain, or to the Almoner as a matter not granted out of the Crown ; in that case it was resolved, that the Ship was a Deodand, and the Jury thereupon found a Verdict for the Lord of *Salisbury* that the same did belong to his Mannor.

XIV. Thus men from their necessity and safety having from hollow Trees, nay Reeds, Twigs and Leather (for such were the rude beginnings of those stupendious things we now admire) advanced the Art to that degree, as to render it now the most useful thing extant ; and as the Mathematicks, Astronomy and other Sciences have added to its security, so have succeeding Ages from time to time, provided Privileges and Laws by which it hath always been regulated and governed, the which upon all occasions, and in all Courts have generally had a genuine construction as near as might be to the Marine Customs ; and therefore at this day, if a Ship be taken away, or the Owners dispossest, they may maintain an Action of Trover and Conversion for an eighth or sixteenth part of the same, as well by the Common Laws of this Kingdom, as the Law Marine, and they need not join with the rest of their Owners.

CHAP. II.

Masters of Ships, their Actions considered in reference to cases private and publick.

- I. A Master or Skipper his condition considered in reference to his Interest and Authority generally.
- II. If Goods be lost or imbezelled, or any other detriment happens in a Port, who shall answer.
- III. The Duty of Masters of Ships, as if they shall set sail after an Embargo, who shall answer.
- IV. Of Faults ascribed to him before departure in Tempestuous weather, staying in Port, &c.
- V. Overcharging or over-lading the Ship above the birth-mark or receipt of such persons on Ship-board as may hazard the Lading.
- VI. Of Lading aboard in the Ships of Enemies, his own proving disabled.
- VII. Of shipping of Goods elsewhere than at the publick Ports or Keys, and of taking in prohibited Goods.
- VIII. Of wearing unlawful Colours or Flags, and of yelaining up his Ship cowardly, if assaulted, where liable, and where excused.
- IX. Of carrying seditious Cocquets and Papers, and refusing payment of Customs and Duties.
- X. Of setting Sail with insufficient Tackle, and of taking in and delivering out with the like, and of his charge of Goods till safely delivered.
- XI. Of departing without giving notice to the Customer.
- XII. Of Faults committed by Masters and Skippers at Sea.
- XIII. Rules in Law in the charging him for reparation of damage.
- XIV. Of the Power and Authority that the Master hath in disposing, Hypothecating or Pledging the Ship, Furniture and Lading.
- XV. Where Masters are disabled, though in necessity, to impawn the Vessel.
- XVI. Where they may dispose of Vessel and Lading, and where not.
- XVII. What Vessels and Mariners the Master must have for Importing in or exporting out of his Majesties Plantations in Asia, Africa and America.
- XVIII. What Ships may go from Port to Port in England.
- XIX. Ships not to import the Goods of any Country but of that from whence they are brought.
- XX. What time the Master shall be coming up after arrived at Gravesend, or at any other Port within the Realm, in order to his discharge.
- XXI. Of going from Port to Port within the Realm how provided.
- XXII. Of Goods prohibited to be imported from the Netherlands or Germany in any Ships whatsoever.

I **A** Master of a Ship is no more than one, who for his knowledge in Navigation, fidelity and discretion, hath the Government of the Ship committed to his care and management, and by the Common Law, by which properties

properties are to be guided, he hath no property either general or special, by the constituting of him a Master; yet the Law looks upon him as an *Officer*, who must render and give an account for the whole charge, when once committed to his care and custody; and upon failure to render satisfaction; and therefore if misfortunes happen, if they be either through negligence, wilfulness, or ignorance of himself or his Mariners, he must be responsible.

Hob. Rep. fol.
11. Bridgman's
Case.

II. If the fault be committed in any Port, Haven, River or Creek, or any other place which is *infra Corpus Comitatus*, the *Common Law* shall have Jurisdiction to answer the party damnified, and not the *Admiralty**; but if the same be committed *super altum mare*, the *Admiralty* shall have Jurisdiction of the same; yet if it be on a place where there is *divisum imperium*, then according to the flux or reflux the admiralty may challenge the other of *Common right* belonging to the *Common Law*.

* Dowdal's
Case.
Coke lib. 6.
fol. 47.

And therefore so soon as Merchandises and other Commodities are put aboard the Ship, whether she be riding in Port, Haven, or any other part of the Seas, he that is *Exercitor Navis* is chargable therewith; and if the same be there lost or purloyned, or sustain any damage, hurt or loss, whether in the Haven or Port before, or upon the Seas after she is in her Voyage, whether it be by Mariners, or by any other through their permission, he that is *Exercitor Navis* must answer the damage, for that the very lading of the Goods aboard the Ship does subject the Master to answer the same; and with this agrees the *Common Law*, where it was adjudged, That Goods being sent aboard a Ship, and the Master having signed his Bills of Lading for the same, the Goods were stowed, and in the night divers persons under the pretence that they were *Press-masters*, entered the Ship and robb'd her of those Goods, the Merchant brought an Action at the *Common Law* against the Master, and the Question was, Whether he should answer for the same; for it was alledged on his part, That there was no default or negligence in him, for he had a sufficient guard, the Goods were all lockt up under Hatches, the Thieves came as *Press-Masters*, and by force robb'd the Ship, and that the same was *vis major* †, and that he could not have prevented the same. And lastly, That though

F. Naut. cap.
lib. leg. 1.
Sect. 2, 3, 6, 7.

† The which
the Civil Law
does some-
times allow.

he

Morse vers. Shue. he was called Master or *Exercitor Navis*, yet he had no share in the Ship, and was but in the nature of a Servant acting for a Salary. But notwithstanding it was adjudged on a Special Verdict found at the Bar.

Debet Exercitor omnium nautarum, suorum sive liberi sint, sive servi, factum prestare, nec immerito factum eorum praeſtat, cum ipse eos suo periculo adhibuerit: sed non alias praeſtat quam si in ipsa nave damnum datum sit, ceterum, si extra navim licet à nautis, non praeſtabit.

Naut. Camp. Stabilit. Leg. 1. Sect. 7. debet Exercitor.

End. Leg. debet Exercitor. If a Master shall receive Goods at the Wharfe or Key, or shall send his Boat for the same, and they happen to be lost, he shall likewise answer both by the Marine Law and the Common Law.

Digest. lib. 9. tit. 2. L'g. 61. III. If Goods be laden aboard, and after an Embargo or Restraint from the Prince or State comes forth, and then he breaks ground, or endeavours to sail away, if any damage accrues, he must be responsible for the same. The reason is, because his Freight is due and must be paid, nay, although the very Goods be seized as *bona contra bandos*.

Leg. Oleron. Judg. 2. IV He must not sail in Tempestuous weather, nor put forth to Sea without having first consulted with his Company; nor must he stay in Port or Harbour without just cause when a fair wind invites his departure.

V. He must not over-charge or lade his Ship above the birth-mark, or take into his Ship any persons of an obscure and unknown condition, without Letters of safe conduct.

Stat. 18 H. 6. cap. 8. Lib ult. ad Leg. Rhod. Et Leg. quum proponas C. de Naat. f. not. VI. Nor ought he to lade any of his Merchants Goods aboard any of the Kings Enemies Ships (admitting his own Vessel leaky or disabled) without Letters of safe conduct, otherwise the same may be made Prize, and he must answer the damage that follows the action,

Nor shall he come or sneak into the Creeks or other places when laden homewards, but into the Kings great Ports,

Ports, (unless he be driven in by Tempest) for otherwise he forfeits to the King all the Merchandize, and therefore must answer. *Stat. 4. H. 4. 20. Leg. fin. parag. si propt. necessit.*

VII. Nor ought he to ship any Merchandize; but only at the *Publick* Ports and Keys. *Stat. 15 H. 6. cap. 8.*

He must not lade any prohibited or unlawful Goods, whereby the whole *Cargo* may be in danger of Confiscation, or at least subject to seizure or surreption. *19 Eliz. cap. 9. 12 P. & M. 3. 1 Jac. cap. 25. 12 Car. 2. cap. 18.*

He may not set sail without able and sufficient Mariners both for quality and number.

VIII. He may not use any unlawful Colours, Ensigns, Pendants, Jacks or *Flags* *, whereby his Ship or Lading may incur a Seizure, or the *Cargo* receive any detriment or damage. ** Proclamation Sept. 25. Anno 26 Car. 2. Per Leg. quum proponas ad Leg. Rhod.*

He must not suffer the Lading to be stolo or imbezled; if the same be, he must be responsible, unless it be where there is *vis major*, as if he be assaulted at Sea either by Enemies, Ships of Reprize, or Pirates, there, if no fault or negligence was in him, but that he performed the part of an honest, faithful, and valiant man, he shall be excused. Yet it hath been adjudged, That if a Merchantman lies in a Port or Haven, and a Pirate, Sea-Rover, or other Thieves enter her and over-power her Men, and then rob her, yet the Master must be responsible; but if an Enemy enter and commit the depredation, there the Master is excused. *D. Leg. in fin. & Leg. si vendita peric. rei vend. & Leg. 5 & 6. Nant. Caup. † Stat. 16 Car. 2. cap. 8. Morfe versus Slue Trin. 23. Car. in B. R.*

IX. He must not carry any counterfeit Cocquets or other fictitious and colourable Ship-Papers to involve the Goods of the Innocent with the Nocent. *13 R. 2. cap. 9. Leg. 1. Cod. de Navib. non excusand.*

Nor must he refuse the payment of the just and ordinary Duties and Port-charges, Customs and Imposts, to the hazard of any part of his Lading; yet if he offers that which is just and pertains to pay, then he is excused. *Secund. fin Leg. ult. ad Leg. Rhod & Leg. quum proponas C. de Nant. fz. nor Leg Oleron. 24. Per Leg. quant. de pub.*

X. He must not set sail with insufficient Rigging or Tackle, or with other or fewer Cables than is usual and requisite, respect being had to the burden of the Vessel: And if any damage happens by the delivery of the Goods into the Lighter, as that the Ropes break, and the like, there he must answer; but if the Lighter comes to the Wharfe or Key; and then in taking up the Goods, the Rope breaks, the Master is excused, and the Wharfinger is liable *. ** Coke lib. Entries, fol. 3.*

It

* Pasch. 26
Car. rul'd at
Guild-Hall by
L. C. J. Hales.

If fine Goods, or the like, are put into a close Lighter, and to be conveyed from the Ship to the Key, it is usual there, that the Master send a competent number of his Mariners to look to the Merchandise, if then any of the Goods are lost and imbezled, the Master is responsible*, and not the Wharfinger; but if such Goods are to be sent aboard a Ship, there the Wharfinger at his Peril must take care the same be preserved.

12 Eliz. cap. 9.
14 Car. 2.
cap. 11.

XI. After his arrival at Port, he ought to see that the Ship be well moored and anchored, and after reladed, not to depart or set sail till he hath been cleared; for if any damage happens by reason of any fault or negligence in him or his Mariners, whereby the Merchant or the Lading receives any damage, he must answer the same.

XII. And as the Law ascribes these things and many more to him as faults, when committed by him or his Mariners, in Ports, so there are other things which the Law looks upon to be as faults in him in his Voyage, when done.

Digest. l. cum
in debito ff. de
Probat.

As if he deviates in his course without just cause, or steers a dangerous and unusual way, when he may have a more secure passage, though to avoid illegal impositions, he may somewhat change his course; nor may he sail by places infested with Pirates, Enemies, or other places notoriously known to be unsafe, nor engage his Vessel among Rocks or remarkable Sands, being thereto not necessitated by violence of Wind and Weather, or deluded by false lights.

Lib. 1. Cod. de
Navibus non
excusand.

XIII. By the Marine Law, he that will charge a Master with a fault, as in relation to his Duty, must not think that a general charge is sufficient in Law, but he ought to assign and specify the very fault wherewith he is so charged.

So he that will infer, that such or such a sad disaster hath happened or been occasioned by reason of some fault in the Mariners, must not only prove the fault it self, but must also prove that that fault did dispose to such a sad event; or that such a misfortune could not have happened without such a fault precedent.

† Receptis sal-
vum fore, utrum
si in navim res

XIV. When Voyages are undertaken, the Master is there placed in by the Owners, and they ought to make good the Masters fact and deed; † and therefore as the whole

whole care and charge of Ship and Goods are committed to the Master, it is the prudence of the Owners to be careful who they will admit Commander of their Ship, since their actions subject them to answer the damage, or what ever other act he shall do in reference to his Employ; and therefore he can freight out the Vessel, take in Goods and Passengers, mend and furnish the Ship, and to that effect, if need be, in a strange Country he may borrow money, with advice of his Mariners, upon some of the Tackle, or sell some of the Merchandise. If part of the Goods shall be sold in such necessity, the highest price that the remainder are sold for must be answered and paid to the Merchant; after which the Merchant must pay for the Freight of those Goods as well as for the remainder, *Leg. Oleron. 1.* But if the Ship in the Voyage happens to be cast away, then only shall be tendred the price that the Goods were bought for.

By the *Common Law* the Master of a Ship could not impawn the Ship or Goods for any property either general or special was not in him, nor is such power given unto him by the constituting of him a Master.

Yet the *Common Law* hath held the Law of *Oleron* reasonable, That if a Ship be at Sea and takes leak, or otherwise want Victual or other Necessaries, whereby either her self be in danger, or the Voyage may be defeated, that in such case of necessity the Master may impawn for money or other things to relieve such extremities by employing the same to that end; and therefore he being the person trusted with the Ship and Voyage, may therefore reasonably be thought to have that power given to him implicitly, rather than to see the whole lost.

But a Master for any debt of his own cannot impawn or Hypothecate the Ship, &c. for the same is no ways liable but in cases of necessity for the relief and compleating of the Voyage.

Nor can he sell or dispose of the same without an authority or Licence from the Owners; and when he does impawn or Hypothecate the Vessel or Furniture, he ought to have the consent and advice of his Mariners.

XV. And where the Ship is well engaged, she is forever obliged and the Owners are concluded thereby, till Redemption.

But

miss. ei assignata sint, an et si non sint ei assignata, hoc tamen ipsi quod in navim missi sint, recepte videntur, & omnium recepti custodiam quae in navim illatae sunt, & factum non solum nautarum prestare debet, sed & restorant. F. Nautae. Leg. 1. Sect. receptis.

Leg. Oleron. cap. 22. Bridgeman's Case, Hobart. fol. 10, 11.

Leg. Oleron. cap. 1. 12.

But in regard Masters might not be tempted to engage the Owners, or infetter them with such sort of obligations, but where there is very apparent cause and necessity, they seldom suffer any to go Skipper or Master, but he that hath a share or part in her; so that if Monies or Provisions be taken up he must bear his equal share and proportion with the rest.

Judgment, Oleron. cap. 22.

Nor can the Master on every case of necessity impawn the Vessel or Furniture; for if she be freighted, and he and the Owners are to join in the laying in of the Provisions for the Voyage, and perhaps he wants money, (a great sign of necessity) yet can he not impawn the Vessel or Furniture, any other or further than for his own part or share in her, the which he may transfer and grant as a man may do an eighth or fifth part in Lands or Houses: But such obligation of the Vessel must be in Foreign parts or places where the calamity or necessity is universal on the Vessel, that will oblige all the Owners.

Judgment, Oleron. cap. 3.

XVI. If the Vessel happens afterwards to be wreckt or cast away, and the Mariners by their great pains and care recover some of the ruines and lading, the Master in that case may pledge the same, the product of which he may distribute amongst his distressed Mariners, in order to the carrying them home to their own Country: but if the Mariners no ways contributed to the Salvage, then their reward is sunk and lost with the Vessel. And if there be any considerable part of the Lading preserved, he ought not to dismiss his Mariners, till advice from the Laders or Freighters; for otherwise perchance he may be made liable.

Leg. Oleron. cap. 22.

If Merchants freight a Vessel at their own charges, and set her to Sea, and she happens afterwards to be Weather bound, the Master may impawn either Ship or Lading at his pleasure, or at least such as he could conveniently raise monies on, rather than see the whole Voyage lost. And if he cannot pawn the Lading, he may sell the same, that is, so much as is necessary; in all which cases his act obliges.

However Orders and Instructions are as carefully to be look'd upon and followed as the Magnet.

The like provision on the like penalty is

XVII. He is not to Import into, or Export out of any the *English* Plantations in *Asia*, *Africa*, or *America*, but in *English*

English or *Irish* Vessels, or of the Vessels built and belonging to that Country, Island, Plantation, or Territory; the Master and 3 fourths of the Mariners to be *English*, upon forfeiture of Ship and Goods. And if otherwise, they are to be look'd upon as Prize, and may be seized by any of the Kings Officers and Commanders, and to be divided as Prizes, according to the Orders and Rules of the Sea.

All Goods of the Growth of his Majesties Plantations are not to be imported into *England*, *Ireland*, or *Wales*, Islands of *Jersey* or *Guernsey*, but in such Vessels as truly belong to Owners that are of *England*, *Ireland*, *Wales*, *Jersey* or *Guernsey*, and 3 fourths at least of the Mariners are to be *English*, upon forfeiture of Ship and Goods.

The Goods and Wares of those Plantations, and brought in such manner as aforesaid, must be brought from those very Countries of their several productions and growths, or from the Ports where they are usually shipped out, on forfeiture of Ship and Goods.

XVIII. No Ship to go from Port to Port in *England*, *Ireland*, *Wales*, *Jersey*, or *Guernsey*, or *Berwick*, unless the Owners are Denizens or Naturalized, and the Master and 3 fourths to be *English*.

All Owners must swear that their Vessels or Ships are their own proper Ships and Vessels, and that no Foreigner hath any share or part in her, and must enter the same; and that she was bought for a valuable consideration, *Bona fide*.

XIX. Nor to bring in any Goods from any place, but what are of the growth of that very Country, or those places which usually are for the first shipping, on pain of forfeiture of their Vessel and Furniture.

This doth not extend so far, but that Masters may take in Goods in any part of the *Levant* or *Streights*, although they are not of the very growth of the place, so that they be imported in *English* Ships 3 fourths *English* Mariners: So likewise those Ships that are for *India* in any of those Seas to the Southward and Eastward of *Cape bona Speranza*, although the Ports are not the places of their very growth.

Any people of *England* may import (the Master and Mariners 3 fourths *English*) any Goods or Wares from *Spain*, *Portugal*, *Azores*, *Madera*, or *Canary* Islands, nay in Ships that are not *English* built, Bullion may be imported; so likewise in those that are taken by way of Prize, *Bona fide*.

But

for Goods of *Moscow* and of the Dominions and Territories of the Great *Czar* or Emperor: So likewise of Currants belonging to the *Ottoman* Territories or Dominions. Note, In cases of sickness, death, captivity, saves the Clause as to Mariners.

That is, those that do not belong to *English*, *Irish*, *Welsh*, or those of *Jersey* or *Guernsey*.

12 Car. 2. cap. 18.

But Sugars, Tabaco, Cottons, Ginger, Indicoes, Fustick, or any other dying Wood of the growth of his Majesties Plantations, to be shipped, carried or conveyd from any of the *English* Plantations, are to be carried to no place in the World, but are to come directly for *England, Ireland, Wales, or Berwick*, upon pain of forfeiture of Ship and Goods, and the Master is to give bond with one Security in 1000 *l*. if the Ship be under the burden of 100 Tuns, and 2000 *l*. if above, that upon Lading he brings his Ship directly into *England, Ireland, Wales, or Berwick*, (the danger of the Seas excepted) so likewise they are to do the same for the Ships that shall go from the Plantations at the Plantations to the Governour, upon forfeiture of the Ship and Goods.

12 Car. 2. c. 12.

XX. When the Master shall arrive at *Gravesend*, he shall not be above three days coming from thence to the place of discharge; nor is he to touch at any Key or Wharfe till he comes to *Chesters Key*, unless hindred by contrary Winds, or draught of Water, or other just impediment to be allowed by the Officers: And likewise he or his Purser are there to make Oath of the Burden, Contents and Lading of his Ship, and of the marks, number, contents, and qualities of every parcel of Goods therein laden to the best of his knowledge; also where and in what Port she took in her Lading, and what Country built, and how manned, who was Master during the Voyage, and who the Owners, and in Out-Ports must come up to the place of unlading, as the condition of the Port requires, and make Entries, on pain of 100 *l*.

14 Car. 2. c. 11.

12 Car. 2. c. 12.

Nor is such a Master to lade aboard any Good soutwards to any place whatsoever, without entring the Ship at the Custom-House, of her Captain, Master, Burden, Guns, Ammunition, and to what place she intends, and before departure to bring in a Note under his hand of every Merchant that shall have laid aboard any Goods, together with the marks and numbers of such Goods, and be sworn as to the same, on pain of 100 *l*.

No Captain, Master, Purser of any of his Majesties Ships of War shall unlade any Goods before Entry made, on pain of 100 *l*.

Note, There is a List of all Foreign built Ships in the Exchequer, and that no Foreign Ship not built in any of his

his Majesties Dominions of *Asia, Africa, or America* after *Octob. 1. 1662.* and expressly named in the List, shall enjoy the Privileges of a Ship belonging to *England or Ireland*, although owned and manned by *English*, except only such as are taken by way of reprice, and condemnation made in the Admiralty as lawful prize; none but *English* and *Irish* Subjects in the Plantations are to be accounted *English*.

XXI. If the Master shall have freight from Port to Port within the Realm, he ought to have Warrant for the same, on pain of forfeiture of the Goods, and he is to take forth a Cocquet, and become bound to go to such Port designed for, and to return a Certificate from the chief Officers of that Port where the same was designed for, and discharged within six Months from the date of the Cocquet.

XXII. But from the *Netherlands* or *Germany* there may not be imported any sort of Wines (other than Rhenish) Spicery, Grocery, Tabaco, Pot-ashes, Pitch, Tar, Salt, Rosin, Deal-boards, hard Timber, Oil, or Olives in any manner of Ships whatsoever.

It might not seem impertinent that this latter part which is abridged, in reference to matters publick, should be inserted, for that sometimes it may happen that an honest and well meaning Master or Skipper might innocently involve and hazard the loss of his Ship by committing acts against Laws positive and prohibitory; and though Masters and Mariners *qua tales* be not so exquisite as to know all that does belong to their Duties, or at least that which the Law lays incumbent on their shoulders; yet for that most of them have some small glimmerings of the same, such hints in matters publick as well as private may not only be of some advantage to them, but also to Merchants, who always upon the miscarriages of the Masters, prove the greatest sufferers, the offenders, for the most part, proving not sufficiently solvent.

CHAP. III.

Of Mariners, their several Offices and Immunities, and of Barratry committed by them.

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| <p>I. The several Marine Officers on Ship-board, and their Charges and Duties.</p> <p>II. Of the Masters power and authority over them, as in relation to punishing, or otherwise.</p> <p>III. The Duty that Mariners owe to each other, and they to the Ship.</p> <p>IV. Their attendance requisite when laded; and if detriment, where to be responsible.</p> <p>V. When Accidents befall them, where they ought to be look'd after, and at whose costs.</p> <p>VI. The Mariners Oath where requisite to the discharging of the Master.</p> <p>VII. What Accidents do destroy, and what not, their wages.</p> <p>VIII. Where they may joyn all in a Suit for the recovery of their wages, and where not.</p> <p>IX. Of their wages where liable to answer damage.</p> <p>X. Where they absolutely lose their Wages.</p> <p>XI. Of Money or Goods taken up by</p> | <p>a Mariner, where it shall be debt, and where a Discount of his Wages.</p> <p>XII. And of their becoming liable to correction.</p> <p>XIII. Barratry in the Mariners, the reason why the Law imputes offences in them to be answered by the Master.</p> <p>XIV. In what cases the Master shall become liable for the actions of his Mariners.</p> <p>XV. Of Goods purloyned before they are brought on Ship-board, where the Master is bound to answer, and where not.</p> <p>XVI. Of the Antiquity of such Custom.</p> <p>XVII. Of Goods brought secretly in on Ship-board, if purloyned, where the Master is not made liable.</p> <p>XVIII. Of Caution or fore-warning, where the same shall excuse the Master.</p> <p>XIX. Where the Master shall be liable notwithstanding such Caution.</p> |
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THE persons ordinary for sailing in Ships have divers denominations: The first, which is the Master, known to us and by most Nations both now and of old, and especially by the Roman Laws, *Navicularius*, or *Magister Navis*; in English rendred Master; or *Exercitor Navis*; in the Teutonicke, Skipper; by the Grecians, *Navarchus* or *Nauclemus*; by the Italians, *Patrono*. But this is only to those Vessels that are Ships of Burden and of Carriage:

For

Leg. 1. & passim ad Leg. Rhod. & lib. 1. parag. 2. Naut. Caup.

For to ships of War the principal there is commonly called Commander or Captain. The next in order of Office to the Master, is he who directs the Ship in the course of her Voyage, by the *French* called *Pilote*; by the *English* and *Flemming*, *Steersman*; by the *Romans*, *Gubernator*; by the *Italians*, *Nocbiero Pilotto* and *Navarchus*, as *Gerettus* writes. The third is esteemed the Master's Mate or Companion, chiefly if the Master be Steersman himself; of old by the *Grecian* and *Romans* called *Proreta*; his Charge is to command all before the Mast. *Vid. Leg. Confid.*

His Successor in order is the Carpenter or Shipwright, by those two Nations of old, called *Naupegeus* by the latter, by the first *Calaphates*; from the Loyns of one of that Rank sprang that great Emperour *Michael*, surnamed *Calaphates*, who denied not to own the quality of his Father among his Regal Titles. The very name *Calaphate* the *Venetian* and *Italian* still use to this day. The Father was of *Phalagonia*, as *Egnatius Volateranus* observes, lib. 23.

The next who succeeds in order, is he who bears the Charge of the Ships Boat, by the *Italians* called *Brachierie*; by the *Grecians* and *Romans*, *Carabita*, from *Carabus*, which denotes the Boat of a Ship.

The sixth in order, especially in Ships of Burden, is the Clerk or Purser, by the *Italians* called *Scrivano*, whose duty is the registering and keeping the Accompts of all received in or delivered out of the Ship; for all other Goods that are not by him entred or taken into charge, if they happen to be cast over-board in a Storm, or are stoln or imbezled, the Master answersthem not, there being no obligation on him by Law for the same; his duty is to unlade by day, not night.

The seventh a most necessary Officer, as long as there are abroad bellies, sharp stomachs and provision, called the Cook.

The eighth is the Ships Boy, who keeps her continually in Harbours, called of old by the *Grecians*, *Nauphylakes*; by the *Italians*, *Guardino*: These Persons are distinct in Offices and Names, and are likewise distinguished in their hires and wages; the rest of the Crew are under the common name of Mariners, by the *Romans* called *Nautæ*; but the *Tarpollians*, or those Youths or Boys that are Apprentices obliged to the most servile duties in the Ship, were of old called *Mesonautæ*.

Il Consolato & Stat. 14. Car. 2. cap. 11.

Budeus ad Leg. 1. Naut. Camp. tor.

* *Per Leg. Ole-
ron, cap. 6.*

*Per Leg. de ex-
erc. aſſ. & l.
in fin. Naut.
Caup.*

II. The Maſter hath the ſupreme Rule on ſhip-board, and by that means his power and authority is by Law much countenanced, eſpecially in the keeping his Crew in peace ſo long as they eat his bread; and if a *Mariner* ſhall happen to be bruifed or hurt in doing his duty and ſervice, the Maſter * is to take care that he be carefully look'd after in order to the procuring his recovery; and if it be occaſioned by the miſcarriage of another on ſhip-board, he may refund the damage out of his wages, but ſtill remembering who gave the firſt aſſault.

If it happens that the Maſter commands his Boat to be manned out, and it ſo happens that the ſame is out of order, or unfit to take the Sea, the Tews, or other accoutrements being impotent, if the *Mariners* happen to be drowned, the Maſter is to repay by the Law *Marine* one whole years hire to the Heirs of the drowned: Therefore Maſters ought carefully to view and ſee that the Boat be fit for men to truſt their lives in upon his command.

*Per Leg. Ole-
ron, cap. 14.*

If a *Mariner* ſhall commit a fault, and the Maſter ſhall liſt up the Towel three times before any *Mariner*, and he ſhall not ſubmit, the Maſter at the next place of Land may diſcharge him; and if he refuſes to go aſhore, he ſhall loſe half his Wages, and all his Goods within the Ship. If the *Mariner* ſhall ſubmit, and the Maſter will not receive the ſame, he ſhall have his whole Wages: or if the *Mariner* ſhall depart the Ship on the Maſter's command, and the Maſter happens not to take another, if any damage happens to Ship or Goods, the Maſter muſt anſwer.

*Per Leg. Ole-
ron, cap. 13. &
per Leg. Den-
marc.*

III. *Mariners* muſt help one another at the Sea and in Port; if any refuſe, upon the Oaths of his Fellows, he loſeth his Wages. None of the Crew muſt or ought to leave the Ship without leave of the Maſter when ſhe comes to a Port, or rides at Anchor, but always conſtantly to wait upon her till they are diſcharged, or have leave, at leaſt half to be left on ſhip-board.

*Leg. nemo de
Reg. jur. &
Leg. plerumq;
de in jus voc.*

A *Mariner* may not carry out of the Ship above one meals meat, but drink not a drop; and when on ſhip-board, ought not to be there arreſted for debt, but only ſo much of his wages in the hands of the Maſter attached: yet this is doubted, if it be not on a ſworn debt, that is, a Judgment or Sentence, or a Penalty to the King.

They ought not to depart from on ſhip-board when once admitted

admitted into their full pay (which is always when they break ground) without licence of the Master ; and before they may so do, they are to leave a sufficient number to guard the Ship and Decks.

IV. If the Ship breaks ground, and is set sail, if after she arrives at her desired Port, their full pay continues till she returns; nor may they in any wise depart from on ship-board without leave or licence of the Master ; if they do, and any disaster happens, they must answer : yet at such Port if the Vessel be well moored and anchored with two Cables, they may go without leave, yet so as they leave a sufficient number behind to guard the Decks : but then their return must be in due season ; for if they make a longer stay, they must make satisfaction. *Leg. Oleron, cap. 5.*

V. If *Mariners* get drunk and wound one another, they are not to be cured at the charge of the Master or Ship ; for such accidents are not done in the service of the Ship : but if any of the *Mariners* be any ways wounded, or do become ill in the service of the Ship, he is to be provided for at the charges of the Ship ; and if he be so ill as not fit to travel, he is to be left ashore, and care to be taken that he hath all accommodations of humanity administred to him : and if the Ship is ready for a departure, she is not to stay for him ; if he recover he is to have his full wages, deducting the Masters charges which he laid out for him. *Leg. Oleron, cap. 7.*

VI. In case of storm if Goods are cast over-board for lightning the Ship, the Oaths of the *Mariners*, swearing that it was done for the preservation of the Vessel and the rest of the Lading, shall discharge the Master. *Leg. Oleron, cap. 11.*

So Goods damnified at Sea, are cleared by the Oath of the Master and *Mariners*, by the Laws of *Oleron*.

To assault the Master on ship-board, is a Crime that subjects the *Mariner's* Hand to be cut off, unless he redeems at 5 *Solz*. *Leg. Oleron, cap. 13.*

VII. If a Ship happens to be seized on for Debt, or otherwise to become forfeited, the *Mariners* must receive their wages, unless in some cases where the wages are forfeited as well as the Ship ; as if they have Letters of Mart, and instead of that they commit Piracy, by reason of which there becomes a Forfeiture of all ; but Lading of prohibited Goods aboard a Ship, as Wool, and the like, though it subjects the Vessel to a Forfeiture, yet it disables *Consolat. del mere. Trin. 7 Jac. B. R. Abridg. Roll. fol. 530. F.*

not the *Mariner* of his wages; for the *Mariners* having honestly performed their parts, the Ship is tacitly obliged for their wages: But if the Ship perishes at Sea, they lose their wages, and the Owners their Freight. And this being the Marine Custom, is allowed by the *Common Law* as well as the *Civil Law*.

VIII. The Courts at *Westminster* have been very favourable to *Mariners* in order to the suing for wages, for at the *Common Law* they cannot joyn, but must sue all distinct and apart for their wages.

Yet in the Admiralty they may all joyn, and the Courts at *Westminster* will not grant a Prohibition*: And so it was Rul'd, where one *Jones*† a Master of a Ship was sentenced in the Admiralty for wages at the Suit of Poor *Mariners*, a Prohibition being prayed upon a suggestion that the Contract was made at Land, and not *super altum mare*; the Court denied it, for that he came too late, Sentence being given below against him: Yet if the *Mariners* had only libelled, and there had been no Sentence, and the Defendant had prayed a Prohibition, as above, yet the Court would have denied it. This hath been and is usually done.

But the Court will be very well informed that the Libel is for *Mariners* wages; for some who work Carpenters work and such like labour aboard a Ship in a Haven or Port within the Realm (which is *infra Corpus Comitatus*, (notwithstanding those great and ingenious objections against it) and must be tried by the *Common Law*, and not elsewhere) will libel under that cloak for *Mariners* wages. But the Court in that case will grant a Prohibition. And so it was done in the like case.

But if a Ship rides at Anchor in the Sea, and the Master sends his Boat ashore for Victuals or other Provisions for the Ship, and accordingly the *Providore* or Slop-seller does bring Victuals and Provisions aboard; in that case if the contract be made there, it must be sued for in the Admiralty: but if the Goods are by the Purser or *Mariners* contracted for at Land, they must sue at *Common Law*.

IX. If Goods are so imbezled, or so damnified that the Ships Crew must answer, the Owners and Master must deduct the same out of their Freight to the Merchants, and the Master out of the wages of the *Mariners*; for though Freight

* Not but they may, notwithstanding the Resolutions of 8 Car. Cro. 3. Reports, which are not now taken to be Law.

† *Jones versus* the Poor *Mariners*. *Winch.* Rep.

Sirwell & al. Owners of a Ship *versus* *Love & al.* *Mich.* 27 Car. in B.R.

Latch. fol. 11. *Hill.* 1 Car. in B. R. *Godfrey's* Case.

Freight is the mother of wages, so is it the very Father of damage: For before the *Mariner* can claim his wages out of what the Ship hath earn'd, the Ship must be acquitted from the damage that the Merchant hath sustained by the negligence or fault of the *Mariners*: And the reason is, for that as the Goods are obliged to answer the Freight, so the Freight and Ship is tacitly obliged to clear the damage; which being done, the *Mariners* are then let in to their wages.

X. If a *Mariner* be hired, and he deserts the service before the Voyage ended, by the *Law Marine* he loses his wages: And the same custom at *Common Law* pleaded, it hath been conceived will bar him. Leg. Oleron.

If a *Mariner* shall commit any wilful or negligent fault, by reason of which the Master, Owners, or the Ship answers damage to the Merchant, an Action lies well against him.

XI. If a *Mariner* takes up Monies or Cloths, and the same is entred in the Purser's Book, by the Custom *Marine* it is a discompt or a receipt of so much of their wages as the same amounts to; And in an Action brought by them for their wages, the same shall be allowed, and is not accounted mutual, the one to bring his Action for the Cloths, and the other for his wages.

XII. A Master of a Ship may give moderate and due Correction to his *Mariners*, and if they bring an Action against him, he may justify the same at the *Common Law*; and by the Law of Oleron, if a *Mariner* shall assault the Master, he is to pay 5 Solz, or lose his hand. Pasch. 27 car.
in B. R. Pidge-
on adfct. Argoe
per L. C. J.
Hales,
Leg. Oleron.

Mariners after they have unladed the Ship, if they demand their wages, and there be any intention of their departure, the Master may detain a reasonable proportion of the same till they bring back the Ship, or give Caution to serve out the whole Voyage. cap. 13.
Per Leg. Oleron
cap. 18.

XIII. *Barratry* of the *Mariners* is a disease so Epidemical on ship-board, that it is very rare for a Master, be his industry never so great to prevent it; a span of Villany on ship-board soon spreads out to a Cloud, for no other cause but of that circular encouragement that one knavish *Mariner* gives another.

However the Law does in such cases impute offences and faults committed by them to be negligences in the Master; Just. de ob.
que ex dilect.
§. Fin.

and were it otherwise, the Merchant would be in a very dangerous condition.

*Pasch 11 Jac.
in B. R. Hern
versus Smith,
Rolls Abridg.
530.*

The reasons why they ought to be responsible are, for that the *Mariners* are of his own chusing, and under his correction and government, and know no other Superior on ship-board but himself; and if they are faulty, he may correct and punish them, and justify the same by Law: and likewise if the fact is apparently proved against them, may re-imburse himself out of their wages.

*Naut. Camp.
Stab. Leg. 1.
Sect. 3, 6, &
7. Morse vers.
Slue. Pasch.
23 Car. 2. in
B. R.*

XIV. And therefore in all cases wheresoever the Merchant loads aboard any Goods or Merchandise, if they be lost, imbezled, or any other ways damnified, he must be responsible for them; for the very lading them aboard makes him liable, and that as well by the *Common Law*, as the *Law Marine*.

*Gloss. super eod.
Sect. verb. &
factum.*

XV. Nay, if his *Mariners* go with the Ship-Boat to the Key or Wharfe to fetch Goods on ship-board, if once they have taken charge of them, the Master becomes immediately responsible if they steal, lose, damnifie or imbezle them.

XVI. The ancientest Record that is found extant, is that in *Edward* the Third's time, where one brought an Action of Trespass against the Master for the imbezlement by his *Mariners* of twenty two pieces of Gold, Bow, Sheaf of Arrows, Sword, and other things, and adjudged he should answer. And for that the same is or may be of great moment, accept of a Transcript of the Record, as the same was certified into *Chancery*, in order to have it sent into the *Kings-Bench*, to enable the Plaintiff to bring an Action upon the same Judgment in any place in *England* where he could meet with the Defendant.

*Brevia Regis
in Turre Lon-
don. Trin. Anno
24 E. 3. n. 45.
Bristol.*

Venerabili in Christo Patri Dño J. Di gratia Wy-
gozn' Episcopo Dñi Regis Ed. Cancellar vel ejus
locum tenenti sui humiles & devoti, Robertus Cyene,
Wajoz Wille Bristol, Edwardus Blankett, & Johannes de
Castleacre Ballivi libertatum ejusdem Wille, salutem,
cum omni reverencia & honore. De tenore & Recordi &
processus loquere que fuit coram nobis in Cur Domini Re-
gis ibidem sine brevi inter Henr Pilk & Jurdanum Wlenore
Magistrum Ravis voc la Graciane de Wapone in plico
transgress' aut per breve Dñi Regis nobis directum fuit
vobis

vobis inde certificatur, sub sigillis nris vobis si placet mittimus in hiis scriptis. Ad placit' Tolls tent' ibidem die Martis prox' post Festum Epiphaniæ Domini anno Regni Regis nunc 24 Henr' Wilk' quer' opt. se versus Iurdanum Menore Magistrum Navis vocat' la Giaciane de Bayone de p'lio transgress' per pl', &c. & unde quer', quod secundum legem & consuetudinem de OLERON unusquisq; Magister Navis tenetur respondere de quacunque transgress' per servientes suos in eadem fact', & Johannes de Kule & Bartolet de Woznes servientes predicti Iurdani Magistri Navis predictæ die Percut' pr' ante Festum Omnium Sanctorum Anno Regni predicti Regis Ed. 23. in Marii iuxta Britan. in eadem navi de Johanne de Coznub' servient' predict' 22 lib' in auro, arcus, sagittæ, gladii, & al' bona & catalla ad valent' 40 l' ceperunt & asportaverunt injuste, &c. ad dampnum predict' Henr' 60 l' & si predictus Iurdanus hoc velit dedicere, predict' Henr' paratus est verificare, &c. Et predictus Iurdanus venit & dicit quod lex de Oleron talis est quod si aliqua bona & catalla Magistro alicujus Navis liberata sunt custodiend', unde idem Magister p' eisdem vel p' aliqua alia re in eadem navi facta manucap, illo modo Magister Navis tenetur respondere, non alio modo, & sup' hoc petit Iudicium. Et predict' Henr' dicit, qd' unusquisque Magister tenetur respondere de quacunque transgressione p' servientes suos in Navi sua fact', & petit Iudicium simpl'. Et sup' hoc predictæ partes habent diem hic die Sabbati pr' post Festum scti Hillarii pr' futur' ad audiend' Iudicium suum, &c. Ad quem diem predictæ partes venerunt & petierunt Iudicium suum, &c. Et recitat, Recordo & processu predictis in plena Curia coram Rege & Magistris & aliiis probis hominibus Willelmo & Magistris & Marinariis, visum fuit Cruis, quod unusquisq; Magister Navis tenetur respondere de quacunque transgressione p' servientes suos in Navi sua facta. Ideo consideratum est, quod predict' Henr' recuperet dampna sua 40 l' versus predict' Iurdanum p' Cur' taxat' & nihilominus idem Iurdanus transgressione predicta in misericordia.

The Judgment in this case is according to Law, and ought not to

have been a *Capiatur*; for it is not such a Trespass as the King is entitled to a Fine. *Vide 2 Cro. 224. Beedle versus Morris, 7 Jac. Co. Entries the same, fol. 347.*

XVII. The Master subject to answer damage, is to be understood in all such cases where the Lading was brought aboard

*Leg. 1. in fin.
Naut. Caup. per
leg. itaque de
furtiv.*

aboard either by his consent or his Purser's; for any other, or such as shall be secretly brought in not being entred in the Purser's Book, or in the Bills of Lading, the Master is not obliged to see forth-coming, unless it be such Goods as the parties bring into the Ship about them, as Cloths, Money, and the like, as above, those things being seldom entred, yet most commonly those that are visible, the Master by Law is responsible for.

*Eod. Leg. in fin.
Naut. Caup. &
per Leg. itaque
de cod. edit.
Bartol. & Jason
in leg. non solum
S. mortem de
non oper.*

XVIII. So likewise if a Master forewarn a Passenger to keep his Goods, and that he will no ways take care of them, and if they be lost or purloyned by the Crew, he will not be obliged to see them forth-coming; the Master is not there held responsible in case of a loss, especially if there be any thing of an agreement thereunto.

*Brand. versus
Glasses, Sir Fr.
Moore, Trin. 25
Eliz. in the
Exchequer.
Vide the same
Book, Mich.
7 Eliz. post
Worley's Case.*

XIX. But if Goods shall be sent aboard a Ship, and the Master shall appoint a Cabin for the same, and deliver the Key to the Lader, and tell him he will not be responsible if a loss happens; yet if the Goods are stole, he must notwithstanding make satisfaction: By the *Common Law* it shall bind an Inn-keeper.

*Mich. 27 Car.
2. per Lord
Chief Justice
Hales.*

Note, That Goods once delivered to a Master, the Cargo is not subject to be attached in his hands, nor can any Custom whatsoever support the same; for they are in Law as it were bailed to the Ship until the Freight and all other charges are paid: and very much doubted whether an Attachment can be made in *London* of any Goods at all lying on ship-board in the River of *Thames* (which though the Port of *London*) notwithstanding Freight and all other charges are paid off.

C H A P. IV.

Of Freight, Charter-parties, and Demorage.

- I. The various ways that Ships may be freighted at this day.
- II. The ancient way of Freightings.
- III. How the same is governed upon the various Contrasts, and of Accidents happening to Masters or Lad-ers preventing the Voyage.
- IV. Of Agreements parol and in writing, how construed by the Common Law.
- V. Of Ships laded and unladed before the Voyage begun; their becoming disabled, viz. perish in the Voyage before the same is completed.
- VI. Of Ships departure considered in reference to Freight and Damage.
- VII. Of Freight arising on Trading Voyages, and lost by contingent Actions, considered by the Common Law, and the Law marine.
- VIII. Of Freight becoming due upon the various ways of Contrast, or general where none was agreed for.
- IX. Of faults arising from the Freighters, and of the decease of the Ship in reference to Freight.
- X. Faults of Masters arising from taking in Goods more than were contracted for; and of being forced into Ports in his Passage.
- XI. Passengers dying, the Ships title to their Goods and Concerns.
- XII. The Ship in construction of Law, how far liable to Freight.
- XIII. Ships taken and retaken in war, whether the same destroys the Contrast.
- XIV. Goods become lost without fault of the Ship, whether Freight becomes due.
- XV. Of Freight contracted with persons deficient.
- XVI. Of Ships contracted for by the month to be paid at the arrival at a Port; Ship is cast away, the Goods saved: whether the Freight ought to be paid.

IN the Freightings of Ships, respect is always had to the Ship it self, or else to a certain part thereof.

Again, the Merchants either Freight her by the *Month*, or the *Entire Voyage*, or by the *Tun*; for it is one thing to Freight a Ship, and another thing to take certain *Tun- nage* to Freight.

So also it is one thing to be a Cape-Merchant, another to be an under-Freighter.

II. There was of old another way of Freightings, which was when the Merchant agreed with the Master for a sum certain to convoy his Goods ensured against all peril; such were to be responsible if any detriment or loss happened: but that is now become absolete.

III. Freight

21 E. 3. Cottons
Abridgment
of the Parlia-
ment Records,
fol. 63.

Naut. Caup.

Stab. Grc. Leg.

1. *S. quacun-*
que vim. Si
quis navem con-
duxerit, instru-
menta configna-
ta sunt. Pe-
kieus Com. ad
Leg. Rhod.
Art. 20.

Per Leg. Na-

val. Rhod.

Art. 19.

Mich. 10 Car.

in B. R. Lang-

don and Stock's

Case. 1 Cro.

fol. 279.

Per Leg. item.

S. Si in Leg.

loc.

Mich. 10 Car.

in B. R. Langdon

and Stock's

Case, Cro. 1.

part, fol. 279.

III. *Freight* is governed generally by the contract, and varies according to the agreement, reduced generally into a Writing commonly called a *Charter-party*, executed between the Owners and Merchant or the Master in the behalf of himself and Owners, or himself and the Merchant, or between them all, or else is parol.

The Master or Owners generally covenant to provide a *Pilot* and all other Officers and *Mariners*, and all other things necessary for the Voyage; and for the taking in and delivering out of the Lading.

If there be an Agreement and *Earnest*, but no Writing, if the same be broke off by the Merchant, he loseth his *Earnest*; but if the Owners or Master repent, they lose double the *Earnest*.

But by the *Common Law* of England the party damnified may bring his Action of the Case, and recover his damages on the Agreement.

If a time is appointed by the *Charter-party*, and either the Ship is not ready to take in, or the Merchant not ready to lade aboard, the parties are at liberty, and the party damnified hath his remedy against the other by Action, to recompence the detriment.

If part of the Lading be on ship-board, and it happens some misfortune may overtake the Merchant that he hath not his full Lading aboard at the time, the Master is at liberty to contract with another, and shall have Freight by way of damage for the time that those Goods were aboard after the time limited; for such agreements being of a *Conditional nature precedent*, a failure as to a compleat Lading will determine the same, unless afterwards affirmed by consent. And though it be no prudence for every Merchant or every Master to depart from the Contract if it should so fall out that the Agreement as to the Lading is not performed according to promise (seldom ever done if any part be aboard) yet it is the highest Justice, that Ships and Masters should not be infettered but free, for otherwise by the bare lading of a *Cask* or *Bale*, they might be defeated of the opportunity of *Passage* or *Season* of the year.

So on the other hand, if the Vessel is not ready, the Merchant may ship aboard in another Vessel the remainder of his Goods, and discharge the first Skipper, and recover damages against the Master or Owners for the rest: This is grounded upon the like reason as the former. And

And therefore by the *Law Marine*, chance, or some other notorious necessity will excuse the *Master*; but then he loseth his Freight till such time as he *breaks ground*, and till then he sustains the loss of the Ship.

But if the fault be in the Merchant, he then must answer the *Master* and the Ships damage, or else be liable to entertain the Ships *Crew* ten days at his own Charge; but if after that, then the full Freight: and if any damage happens afterwards, the Merchant must run the risk of that, and not the *Master* or Owners. But by the *Common Law*, so long as the *Master* hath the Goods on ship-board, he must see them forth-coming.

IV. *Charter-parties* have always by the *Common Law* had a genuine construction as near as may be, and according to the intention and design, and not according to the literal sense of Traders, or those that merchandize by Sea, yet they must be regularly pleaded; and therefore where one had by *Charter-party* dated Sept. 8. 38 Eliz. hired a Ship for a Voyage to *Dantzick* for Corn, it was agreed betwixt them, that after the Ship should be laden she should sail to *Leghorn*, there to be delivered, and in consideration that the Plaintiff had agreed, that the Defendant should have the moiety of Corn, *quod tunc fuit*, or hereafter should be laden in the Ship during the said Voyage, the Defendant by Judgment dated Oct. 9. 38 Eliz. covenanted to pay the moiety of the money for the said Corn, *quod tunc fuit*, or afterwards should be laden, &c. and then comes and says, that Oct. 9. 38 Eliz. the Ship was laden with 60 Lasts of Corn, and for not performance of the moiety of his payment the Action was brought; the Defendant to this comes in and pleads that the Deed was sealed Oct. 28. in 38 Eliz. & *quod ad tunc vel postea* there was not any Corn laden there, and traverseth the delivery Oct. 9. in this case it was adjudged, That in regard the Plaintiff declared upon a Deed dated Oct. 9. 38 Eliz. it shall be intended to have its essence and delivery at that time, and at no other; and if he should confess it to be delivered at any other time, it would be a departure from his Declaration, and the word *tunc* is referred to the delivery, and not to the Date; and if it were delivered ten months after the Date, he should not have the benefit of the Corn laden before the delivery: and therefore the Defendant was adjudged not to be charged

Per Leg. si ex conduct. & Leg. si item fundus & Leg. hac distinctio.

Per Leg. Oleron, cap. 21.

Art. 25. Legum Naval. Art. 29. eod.

Rich. vers. Kneeland. Cro. 2. part.

Mick. 8 Jac. in B.R. Offley vers. Sir Baptist Hix, Cro. 2. part, fol. 263.

with paying for any Corn before the delivery of the Deed, the words of the Deed being, that he should pay for the Corn then laden, &c. which (*then*) is referred to the time of the Essence of the Deed by the delivery, and not to the Date.

A does contract with *B.* and does assume to him to deliver an hundred Quarters of Barley on ship-board in such a Port. *viz.* at *Burten Haven in Com. Ebor.* and mentions no time for the Barley to be carried there, &c. *A.* assumes to carry them there, and be at this Port with them, *B.* agrees to pay so much for the said Quarters of Barley, *A.* doth arrive with his Boat there, this is a good Contract: But in this case *A.* is bound to be *B.* at the said Haven, and to deliver to him the said hundred Quarters, as aforesaid, *A.* doth it not, albeit *B.* hath performed his Promise, and was there ready to receive it, *B.* brings an Action on the Case and adjudged it lay.

Affirmed in
Errour, Mich.
13 Jac. Arkin-
son vers. Buckle.

Jenkins Cent.
8. Case 39.

Ad Leg. Rhod.

V. If Goods are fully laded aboard, and the Ship hath broke ground, the Merchant on consideration afterwards resolves not on the *Adventure*, but will unlade again; by the *Law Marine* the Freight is due.

Judg. Oleron.
Leg. ult. ad
Rhod.

And if the Ship in her Voyage becomes *unable* without the Masters fault, or that the Master or Ship be Arrested by some Prince or State in her Voyage, the Master may either mend his Ship, or Freight another.

Digest. Paulus,
L. 14. c. 2.
Sect. 10.

But if the Merchant will not agree to the same, then the Freight becomes due for so much as the Ship hath earned: For otherwise the Master is liable for all damages that shall happen. And therefore if that Ship to which the Goods were translated, perished, the Master shall answer; but if both the Ships perish, then is he discharged.

But if there be extreme necessity, as that the Ship is in a sinking condition, and an empty Ship is passing by, or at hand, he may translate the Goods; and if that Ship sink or perishes, he is there excused: but then it must be apparent that that Ship seemed *probable* and *sufficient*.

Leg. qui Romæ
Sect. Callima-
chus, ff. de
verb. obl.

VI. If a settime be fixed and agreed upon between the Merchant and the Master wherein to begin and finish his Voyage, it may not be altered by the *supra* Cargo without special Commission for that purpose.

If a Master shall weigh anchor and stand out to his Voyage after the time covenanted or agreed on for his departure,

ture, if any damage happens at Sea after that time, he shall refund and make good all such misfortune; yet if a *Charter-party* is made, that the Plaintiff shall sail from *London* to *Lisbon* with the first Wind and Opportunity, &c. in consideration of which the Merchant did covenant to pay so much for Freight; the Ship departs not with the first Wind or Opportunity, yet afterwards *breaks ground*, and arrives at her Port, the Freight in this case is become due; for there is nothing can bar the Ship of her Freight but the not departure, for only that in Law is traversable, being material to avoid the payment of Freight; but to say the Ship did not depart with the next wind, is but a circumstance which in strictness of Law is not traversable.

Pasch. 2 Car. in B. R. Constable and Colberries versus Popham. 161.

If it be agreed that the Master shall sail from *London* to *Leghorn* in two months, and Freight accordingly is agreed on, if he begins the Voyage within the two months, though he does not arrive at *Leghorn* within the time, yet the Freight is become due.

Angl. Alex. & Jason in dist. S. Callimachus.

VII. If a Ship is freighted from one Port to another Port, and thence to a third, fourth, and so home to the Port from whence she first sailed, (commonly called a *Trading Voyage*) this is all but one and the same Voyage, so as it be in conformity to the *Charter-party*.

Leg. Relagari ff. de penis & Leg. ult. de Sep. viis.

A Merchant agrees with a Master, That if he carries his Goods to such a Port, he will then pay him such a sum; in the Voyage the Ship is assaulted, entred and robb'd by Pirates, and part of her Lading taken forth, and afterwards the remainder is brought to the Port of discharge, yet the sum agreed upon is not become due; for the Agreement is not by the Master performed.

Trin. 9. Jac. in C. B. Rot. 638. Bright versus Cooper, Brown. 1 part.

But by the *Civil Law* this is *vis major*, or *casus fortuitus*, there being no default in the Master or his Mariners, and the same is a danger or peril of the Sea, which if not in Naval Agreements exprest, yet is naturally implied: For most certain, had those Goods which the Pirates carried away in stress of weather, *Navis levanda causa*, been thrown over-board, the same would not have made a disability as to the Receipt of the sum agreed on; for by both the *Common Law* and the *Law Marine*, the act of God, or that of an Enemy shall no ways work a wrong in actions private.

Co. 1. part. 97. Shelley's Case. Reniger and Fogassas Case. Plowden Com. But a Pirate is not an Enemy. Vide chap. Piracy.

VIII. If a Ship be freighted by the Tun, and she is full laden

laden according to the *Charter-party*, the Freight is to be paid for the whole ; otherwise but for so many Tun as the Lading amounted to.

*Leg. Si quis
Cod. de Justit.
& substit.*

If Freight be contracted for the lading of certain Cat-
tel, or the like, from *Dublin* to *West-Chester*, if some of them
happen to die before the Ships arrival at *West-Chester*, the
whole Freight is become due as well for the dead as the
living *.

* *Arg. Leg. Scio
ff. de annis le-
gat. & leg. illis
libert. in fin. ff.
de condit. &
demon. Arg. 7.
† Leg. qui ope-
ras & Leg. si
ades s. cum
quidam & s.
fin. ff. locati
Leg. sed &
ades in s. Si
quis mulierem
ff. locat.*

But if the Freight be contracted for the transporting
them, if death happens, there arises due no more Freight
than only for such as are living at the Ships arrival at her
Port of discharge, and not for the dead †.

If the Cattel or Slaves are sent aboard, and no Agree-
ment is made either for lading or transporting them, but
generally, then Freight shall be paid as well for the dead
as the living.

If Freight be contracted for the transporting of Women,
and they happen in the Voyage to be delivered of Children
on ship-board, no Freight becomes due for the Infants.

There are 3
Bills of Lading
always made,
the one to be
sent over Sea
to him whom
the Goods are
configned to,
the other for
the Master,
and the last
for the Mer-
chant or La-
der.

The *Charter-party* does settle the Agreement, and the
Bills of Lading the contents of the Cargo, and binds the
Master to deliver them well-conditioned at the place of
discharge according to the Contents of the *Charter-party*
or Agreement ; and for performance, the Master ob-
liges himself, Ship, Tackle and Furniture to see the
same done and performed.

If Goods are sent aboard, generally the Freight must
be according to Freight for the like accustomed Voyages.

If a Ship shall be freighted and named to be of such a
Burden, and being freighted by the Tun shall be found
less, there shall no more be paid than only by the Tun for
all such Goods as were laded aboard.

If a Ship be freighted for two hundred Tuns or there-
abouts, the addition of *thereabouts* is commonly reduced to
be within five Tun more or less, as the moiety of the num-
ber *Ten*, whereof the whole number is compounded.

*Chase & Jones
vers. Lovering
Styles 220.
Leg penult. s. 9.
F. de locat.*

If a Ship be freighted by the great, and the burden of it
not exprest, yet the sum certain is to be paid.

IX. If the Ship, by reason of any fault arising from the
Freighter, as lading aboard prohibited or unlawful Com-
modities, occasions a detention, or otherwise impedes the
Ships Voyage, he shall answer the Freight contracted and
agreed for.

If a Ship be freighted *out* and *in*, there arises due for Freight nothing till the whole Voyage be performed: so that if the Ship die, or is cast away coming home, the Freight outwards as well as inwards becomes lost.

Trin. 9. Jac:
B. R. Bright
versus Comper,
Brownlow,

X. If a Master freights out his Ship, and afterwards secretly takes in other Goods unknown to the first Laders, by the Law *Marine* he loses his Freight; and if it should so fall out, that any of the Freighters Goods should for safety of the Ship be cast over-board, the rest shall not become subject to the Averidge, but the Master must make good that out of his own Purse: but if the Goods are brought into the Ship secretly against his knowledge, it is otherwise; and Goods so brought in, the same may be subjected to what Freight the Master thinks fitting.

1 part.
Leg. Oleron.
Leg. Naval.
Rhod. Art. 23.

If the Ship puts in to any other Port than what she was freighted to, the Master shall answer damage to the Merchant; but if forced in by storm, or by Enemy, or Pirates, he then must sail to the Port conditioned at his own costs.

Consol. del Mer.

Leg. Oleron.

Generally the touching at several Ports by Agreement imports not a diversity, but a Voyage entire.

Rule.

XI. If Passengers having Goods happen to die on ship-board, the Master is to inventory their Concerns, and the same may a year keep; and if none claim the same, the Master becomes Proprietor defeasible: but the Bedding and Furniture of the parties become the Master's and his Mates, and the cloathing are to be brought to the Ship's Mast-head, and there praised and distributed amongst the Crew, as a reward for their care of seeing the body put into the Sea.

Leg. Consolat.
del Mere.

XII. The Lading of the Ship in construction of Law is tacitly obliged for the Freight, the same being in point of payment preferred before any other Debts to which the Goods so laden are liable, though such Debts, as to time, were precedent to the Freight; for the Goods remain as it were bailed for the same: nor can they be attached in the Masters hands (though vulgarly is conceived otherwise.)

Bald. in leg. cer-
ti juris in 4. Q.
in verb. Quid
ergo Cod. locat.

Ships deserve wages like unto a Labourer, and therefore in the eye of the Law the Actions touching the same are generally construed favourably for the Ship and her Owners: And therefore if four part Owners of five shall make up their Accompts with the Freighters, and receive their proportions, yet the fifth man may sue singly by himself

Hill. 26, 27
Car. 2. in B. R.
Stanley versus
Ayles by Hales.
Keeble. 3. Rep.
444.

without joyning with the rest; and this as well by the *Common Law* as the *Law Marine*.

XIII. A Ship in her Voyage happens to be taken by an Enemy, afterwards in Battel is re-taken by another Ship in amity, and restitution is made, and she proceeds on in her Voyage, the Contract is not determined, though the taking by the Enemy divested the Property out of the Owners; yet by the Law of War that possession was defeasible, and being recovered in Battel afterwards, the Owners became re-invested: so the Contract by fiction of Law became as if she never had been taken, and so the entire Freight becomes due.

*7 R. 2. Statham
Abridg. 54.
In Jure Possi-
minii leg. retor.
& leg. in bello,
§. 1.
Boyce vers. Cole
Sen. & Cole
jnn. Hill. 26,
27 Car. 2. in
B. R.*

XIV. If Freight be taken for 100 Tuns of Wine, and twenty of them leak out, so that there is not above eight inches from the Buge upwards, yet the Freight becomes due: One reason is, because from that gage the King becomes entitled to Custom; but if they be under 8 inches, by some it is conceived to be then in the Election of the Freighters to sling them up to the Master for Freight, and the Merchant is discharged. But most conceive otherwise; for if all had leak'd out, (if there was no fault in the Master) there is no reason the Ship should lose her Freight; for the Freight arises from the Tunnage taken, and if the leakage were occasioned through storm, the same perhaps may come into an Averidge. Besides, in *Bourdeaux* the Master stows not the Goods, but the particular Officers appointed for that purpose, *quod nota*. Perhaps a special Convention may alter the Case.

When such a misfortune happens, the Entired commonly transfer those Goods over to the Assurers, who take them towards satisfaction of what they pay by virtue of their subscriptions.

Most certain, if a Ship freighted by the great be cast away, the Freight vanishes; but if by the Tun or Pieces of Commodity, and she happens to be cast away, afterwards part is saved; doubted whether *pro rata* she ought not to be answered her Freight.

XV. If a Merchant takes Freight by contracting with a Mariner that is not a Master, if loss happens, he must be contented to sit down without any remedy against the Owners; but perhaps such a Mariner for such an Act may subject himself to an Action.

*Coke 4. Instit.
fol. 146.*

But if there be a fault committed by a Mariner which was hired or put in by the Master or Owners, there for reparation the Owners become liable.

XVI.

XVI. The Master is not bound to answer Freight to the Owners for Passengers, if they are found to be unable to pay. *Johannes Lock-
nim, l. 3. c. 8.*

If a Ship by *Charter-party* reciting to be of the burden of 200 Tuns is taken to Freight for a sum certain, to be paid at her return, the sum certain is to be paid, though the Ship amounts not to that Burden.

If a Ship is freighted after the rate of 20 *l.* for every month that she shall be out, to be paid after arrival at the Port of *London*; the Ship is cast away coming up from the Downs, but the Lading is all preserved; yet the Freight is become due: for the money arises due monthly by the Contract, and the place mentioned is only to shew where payment is to be made, for the Ship deserves wages like a Mariner, who serveth by the Month; and though he dies in the Voyage, yet his Executors are to be answered *pro rata*. Besides, the Freight becomes due by intendment on the delivery or bringing up of the Commodities to the Port of *London*, and not of the Ship.

If a man freights a Ship out, and covenants that the Ship with the first Wind and Opportunity should sail out of that Port to *Cales*, and the Freighter covenants that he for the Freight of all the Premises would pay unto the Master 184 *l.* *pro tota transfretatione omnium premissarum*, if the Master doth not aver that the Ship did arrive at the Port of *Cales*, he cannot maintain an Action against the Freighter. If the Master enters into a *Charter-party* for himself and Owners, the Master in that case may release the Freighters without advising with the Owners; but if the Owners let out to Freight such a Ship whereof *J. S.* is Master, though the Master Covenant in the same *Charter-party* and subscribes, yet his Release in that case will not bind the Owners, but the Owners release on the other hand will conclude the Master: And the reason is, for that the Master is not made a proper party to the Indenture. And so it was ruled, where an Indenture of *Charter-party* was made between *Scudamore* and other Owners of the good Ship called the *B.* whereof *Robert Pitman* was Master on the one party, and *Vandensfene* on the other party; in which Indenture the Plaintiff did covenant with the said *Vandensfene* and *Robert Pitman*, and bound themselves to the Plaintiff and *Robert Pitman* for performance. *Clerk vers. Gurnel, Pasch. 8 Jac. in B. R. Rot. 530. Bulstrode 1 part, fol. 167.*

*Scudamore &
al^l versus Pit-
man. Trin. 29
Eliz. in B. R.
cited in Coke
2. Instit. fol.
673.*

mance of Covenants in 600*l*. and the Conclusion of the Indenture was, — *In witness whereof* the said Robert Pitman put his Hand and Seal, and delivered the same; in an Action of Debt brought upon the Bond for performance of Covenants, the Defendant pleaded the Release of Pitman; whereupon the Plaintiff demurred: And it was adjudged, That the Release of Pitman did not bar the Plaintiff, because he was no party to the Indenture. And the diversity in that case was taken and agreed between an Indenture reciprocal between parties on the one side, and parties on the other side, as that was; for there no Bond, Covenant or Grant can be made to or with any that is not party to the Deed; but where the Deed indented is not reciprocal, but is without a *Between, &c.* as *Omnibus Christi fidelibus, &c.* there a Bond, Covenant or Grant may be made to divers several persons.

CHAP.

CHAP. V.

Of Wreck.

- I. Of Goods wreckt as in relation to the alteration of the property by the Civil Law.
- II. Of the preservation of Goods Wreckt, and the punishment of those that should add misery to the condition of such persons so distressed.
- III. Of Goods Wreckt, their preservation according to the Laws of Oleron, and of England, and of the punishment of those that shall not make restitution.
- IV. Of contribution where the Ship perishes, and the Goods are all saved, and where not.
- V. The King of Great Britain's Prerogative as in relation to Wreck and other Royalties of the Sea.
- VI. Of Flotsam, Jetsam, and Lagan, where the King shall have the same, and whether by the Grant of Wreck the same passes; and where a Subject may prescribe.
- VII. Of Ships Wreckt and no creature in them, yet no Wreck; and of Ships forsaken, whether in Law accounted lost or wreckt, or neither.
- VIII. Of the Sheriff's duty as in relation to Goods Wreckt; and of Owners their time of claiming their property.
- IX. Wreckt Goods not to pay custom.
- X. Of Wreck in the Isle of Wight; not in the Admiral without special words.

I **N** matters of *Wreck* there is as it were a Contract between them which have lost their Goods by such misfortune, and them upon whose Lands the Goods and Merchandize are driven, that the same be restored to them or those that claim under them. And therefore by the *Civil Law* it is precisely forbid, that no man shall meddle with such Goods as are Wreckt; and such as are proved to have stoln any thing thereout, are holden for Robbers; for that such Goods being cast on Land and recovered out of the Sea, remain still his who was the owner thereof, and descend upon his Successor; neither Escheate to the King, neither to any other to whom the King hath granted such Royal Privilege.

The reason why the Laws were so strictly declared by the *Romans*, was, for that by the Laws of *Rhodes*, if any Ship had become Wreck, though all the persons were saved and alive, yet the Ship and Goods became seisible by the

Leg. ne quid ff. de incendior, ruina & naufragio.

Leg. 44. D de acq. rer. dom.

Lords : but the same being barbarous, was afterwards repealed and abrogated.

The Emperor *Constantine* the Great says in this Case, if any Ship at any time by any Shipwrack be driven to the shore, or touch at any Land, *Let the Owner have it, and let not my Exchequer meddle with it : for what right hath my Exchequer in another man's Calamity, so that it should hunt after Gain in such a woful Case as this is ?*

And yet if no Kindred appear within a year and a day, or appearing, prove not the Goods shipwracked to be theirs, the Goods come to the *Exchequer* even by that Law : So much that Law condemns carelessness, which is written, *vigilantibus & non dormientibus, &c.* And with this agree the Laws of *Oleron* and the Laws of this Land, as taken out of those Imperial Laws, in that point, as is conceived.

Leg. 1. in pr. de incend. ruin. leg. in eum cum auth. seq. de furt. Leg. 3. in fir. de incend. ruin. naufrag.

II. The *Civil Law* was ever so curious and careful to preserve the Goods of such miserable persons, that if any should steal such, they should pay four-fold to the Owner, if pursued within a year and a day ; and as much to the Prince or his Admiral : So careful were they, and so exact in requiring restitution, that the very stealing of a Nail, or the worth thereof, obliged the Thief to the restitution of all the remaining Goods. And by the Emperour *Antoninus* it was made a Law for such sort of men, that they should be batten'd and banish'd for three years ; but that was only for those of a high and honourable Rank : but those that were base and ignoble, should be scourged and sent to the Gallies or Metal-Mines.

Leg. pedibus cod.

Arg. leg. succursarii de Extrad. Crim.

And the preventing of help to such shipwrack't persons, was punish'd with the same suffering as a Murderer.

The like for those that shall put forth any treacherous Lanthorn or Light, with intention to subject them to danger or shipwrack, was punish'd with Death.

Per leg. incend. ruin. naufrag. Leg. ne piscator.

And though no harm happens, yet he may be punished : hence it is, that Fishers are forbidden to fish with Lights in the Night, for fear of betraying Sailers.

And here I cannot omit the great and pious care that His Majesty hath had in his Directions about Light-Houses and Lanthorns, and other special Sea-marks ; but more especially in his Erecting at his own Princely Charge that most excellent Light-House near *Goldston* by *Tarmouth*, which both for Height, Curiosity, and Form, is not inferiour to, if not exceeding all or most in Christendom.

III. And

III. And as the Emperour and other Maritime Kingdoms had in some sort abrogated and repealed that cruel Law, and subjected the Violators to punishment for the Inhumanity offered to such distressed persons; so our famous King *Richard* returning from the Holy War, in his own experience at Sea became sensible of the miseries which Merchants and Mariners at Sea underwent, their lives being always within few inches, often within an hairs breadth of death; and having consideration of their calamitous and distressed state, in his Voyage resolved to revoke that Law, and at *Oleron* in the Bay of *Aquitane* (then part of his Dominions) as Sovereign Lord of the Ocean and all those Maritime Kingdoms, did there amongst other good Marine Laws declare, That if any person or living thing escaped out of any wrecked Ship to land, it should not be wreck nor confiscated to him or his Successors, as it was before, though all the men escaped alive. For before that both in *England* and in *Normandy* * *Bracton*, lib. 2. cap. 5. the Crown was entituled to shipwrack Goods, and the King *Jure Gentium* (indeed according to the *Rhodian Law*) † *Custuma* Norman. c. 17. became Heir unto them, which otherwise *Jure naturali* were conceived to be *in bonis nullius*, pertaining to no Owner: But now that Valiant and Religious Prince resolved no longer to embrace so cruel a Prerogative by the stripping the distressed Mariners of those Rags of their Estates, which the Mercy and Modesty of the Waves and Winds had left them; and therefore in the Month of *October* at *Missana*, in the presence of many Archbishops and Bishops and others, he then forever quitted the Royal Claim to Wrecks, which afterwards was declared and published at *Oleron* in his own Territories; so that if any man out of the Ship came alive to shore, the property of the shipwrack Goods was still preserved to the Owner: which Royal condescension was so enlarged by our succeeding Kings, That if a Man, Dog, or Cat escapes alive out of the Ship, neither the Ship or other Vessel, nor any thing therein shall be adjudged Wreck, but the Goods shall be saved and kept by the Sheriff, Coroners, or the Kings Bailiffs, and delivered to the Inhabitants of the Town where the Goods are found; so that if any within a year and a day sue for those Goods, and after prove that they were his at the time of the Shipwrack, they shall be restored to him

Roger Hoveden
in the latter
part of his An-
nals, fol. 678.
Joan. Brompton,
Chron. Coll. fol.
1887.

Westm. I. cap. 4.
3 E. 1. Nau-
fragia ad pub-
lic. pertina.

*Per Leg. Ole-
ron, cap. 47.*

him without delay: but if not, they shall be seized by the said Sheriff, Coroners, or Bailiffs, for the Kings use, and shall be delivered to the Inhabitants of the Town, who shall answer before the Justices for the Wreck belonging to the King; but this good Law extends not to Pirates, Robbers, Sea-Rovers, Turks, or other Enemies to the Catholick Faith.

Where the *Wreck* belongs to another, he shall have it in like manner; and if any be attainted to have done otherwise, he shall suffer Imprisonment, make Fine to the King, and yield damage also.

If a Bailiff do it, and it be disallowed by his Lord, the Bailiff shall answer for it if he hath wherewithal; but if not, the Lord shall deliver his Bailiff's Body to the King.

*Leg 37. Naval.
Rhod. & 40.*

IV. If the Ship perishes only, and the Goods are safe, in that case the Goods ought to pay a proportion of a fifth or tenth penny, according to the easie or difficult winning or saving of the said Goods; rich Goods, as Gold and Silver and Silk pay less than Goods of great weight and cumber, being in less danger, unless it were a Wreck going into a Port, which the Skipper was not bound for, there *è contra*, then the Skipper is not to be considered.

But if the Ship and Goods perish in the Sea, and the Owners do totally forsake her, and so she becomes a meer *Derelict*, in that case the first Possessor that recovers her, or any part of her Lading, gains a *Property*: And this according to the Laws of Nations, *as is that given for lost, whereof there is no hopes of Recovery*, like a Lamb in the Paws of a Lion. And the incomparable *Ulpian* compares such a *Dereliction* to a man that knows his own Goods to be by another man detained, and makes no claim unto them in a long time; unless some cause do manifestly appear, seemsto do it to no other purpose but to shew that he is willing to renounce them; and this is it that *Ulpian* elsewhere intends, where he saith, that a House possess'd for a long time by another, and no claim made, nor Rent demanded for it, seems to be deserted by the right Owner.

To exact Interest long since due, saith that good Emperor *Antoninus*, is hardly just; for the not demanding it in so long a space, makes it probable that thou wert willing to remit it,
and

and that by not so much as demanding it, thy purpose was to make thy self the more beloved and honoured, and thy Debtor the more thankful.

Now that Silence should be of such a force as to justify our presumption of a *Dereliction*, two things are requisite; First, That he that is silent knows that he hath a Right; for him that knows it not, silence cannot prejudice. Secondly, That his silence be free and voluntary, and not occasioned by fear, or any other such cause; and the true reason is, that it is hardly possible that in a long time a man should not by some means or other arrive at the knowledge of his own Right, time daily administering occasions to the discovery of Truth.

But because that time, which exceeds the memory of man, is in a moral sense infinite, therefore if claim be not made within a *reasonable time* to a thing out of possession, it is a sufficient Presumption that it is *forsaken*, unless some very strong Reasons be brought to the contrary; and therefore the recovery of the Plate near the *Babama Rocks*, lost near fifty years since by the *Spaniard*, became most apparently a *Derelict*, and free not only for the Undertakers to recover and possess, but to keep as a Property justly acquired by them, as well by the Laws of Nations, as the *Civil Law*. Grotius lib. 2. cap. 4. §. 5, 6. Duke of Albe-marle & al. in Anno 1687.

V. The King shall have Wreck of the Sea, Whales, and great Sturgeons taken in the Sea and elsewhere throughout the whole Realm, except in places privileged by the King.

VI. By the Grant of Wreck will pass *Fletsam*, *Jetsam*, and *Lagan*, when they are cast upon the land; but if they are not cast upon the land, the Admiral hath Jurisdiction, and not the *Common Law*, and they cannot be said Wreck. Sir Henry Constable's Case, Coke 5. part. fol. 107.

Wreccum Maris, are such Goods only as are cast and left upon the Land by the Sea.

Fletsam, is when a Ship is sunk or otherwise perished, and the Goods float upon the Sea. Faber & alii inst. de rer. div. Sect. pen.

Jetsam, is when the Ship is in danger to be sunk, and for lightning the Ship, the Goods are cast into the Sea, notwithstanding which the Ship perisheth.

Lagan vel Ligan, is when the Goods being heavy, are cast into the Sea before the Ship perishes, which by the prudence of the Master or Mariners, who have an intent Leg. 7. D. pro derelicto.

tent to save them so sunk, as that they may come at them again, in order to which they fasten a Buoy or other light matter that may signifie to them where they lie, if Providence should bring them in a condition to retake them.

46 E. 3. 15.

F. N. B. 112.

Anth. Omnes

perigrini com-

munita de suc-

cessionibus acq.

per Leg. Oleron.

Coke 5. part,

fol. 107.

Coke 2. Instit.

fol. 167.

Leg. 2. D. de

leg. Rhod. de

jacu.

5 R. 2. pro

Willielmo Fish-

lake. Co. 2. Inst.

f. 167. Leg. 43.

§. 11. D. de

furt.

Pl. Com. 466.

F. N. B. fol. 12.

DD. diplo. &

de Off. Admir.

Left unresol-

ved in Moor,

fol. 24. But

since adjudg-

ed in C. B. upon a special Verdict found at St. Edmunds Bay in Suffolk.

The King shall have *Flotsam*, *Fetsam*, and *Lagan* when the Ship periseth, or when the Owners of the Goods are not known; but when the Ship periseth not, *è contra*.

A man may have *Flotsam* and *Fetsam* by the King's Grant, and may have *Flotsam* within the high and low Water-mark by Prescription, as it appears by those of the West-Countries, who prescribe to have Wreck in the Sea, so far as they may see a *Humber* Barrel.

VII. If a Ship be ready to perish, and all the men therein for safeguard of their lives leave the Ship, and after the forsaken Ship periseth, if any of the men be saved and come to land, the Goods are not lost.

A Ship on the Sea was pursued by Enemies, the men for safeguard of their lives forsake the Ship, the Enemies take the Ship and spoil her of her Goods and Tackle, and turn her to Sea; by stress of Weather she is cast on-land, where it happened her men arrived: It was resolved by all the Judges of *England*, That the Ship was no Wreck, nor lost.

VIII. If Goods are cast up as Wreck, and it falls out they be *bona peritura*, the Sheriff may sell them within the year, and the sale is good; but he must account to the true Owners.

Owners claiming the Wreck, must make their proof by their Marks or Cocquets, by the Book of Customs, or by the Testimony of honest men; and if the Wreck belongs to the King, the party may sue out a Commission to hear and determine, and that by the Oaths of twelve men; or else he may bring his Action at Law, and make out his Proof by *Verdict*; but such Action must be brought *within the year and day*.

Note, *Flotsam*, *Fetsam* and *Lagan*, are Goods on or in the Sea, and belong to the King, who by Charter hath granted them to the Lord Admiral.

IX. If Goods were wreckt on the shore, and the Lord having power, takes them, he shall not pay Custom, nei-

ther by the *Common Law* nor by the *Statute*; for at the *Common Law* wrecked Goods could not be charged with Custom, because at the *Common Law* all Wreck was wholly the Kings, and he could not have a small duty of Custom out of that which was all his own; and by *Westm. 1.* where wrecked Goods belonged more to another than to the King, he shall have it in like manner, that is, as the King hath his.

Now Goods that are chargeable with Custom according to the Act of *Tunnage and Poundage*, must have these Properties. 12 Car. 2. c. 4.

1. They must be Goods which shall come or be brought into the Ports or Places of the Kingdom.

2. They must come or be brought into such Ports or places as *Merchandize* that is for sale, and to that end; for there can be no other conception of Goods brought as *Merchandize*.

3. They must come and be brought as *Merchandize*, and for sale by the King's natural born Subjects, or by Strangers and Aliens, as distinguish'd from the natural Subjects.

4. The Duty payable to the King is to be measured by the quality of him that imports the Commodity; that is, if the Importer be a natural Subject he pays less to the King, and if an Alien, more.

5. All those Goods charged with the Duty by the *Statute*, so to come or be brought into the Ports or Places of the Kingdom, are to be foreign, as of the growth of *France, the Levant, Spain, Portugal, Germany, &c.*

Whence it follows, 1. That Goods of Foreign growth, and which by their kind, are to pay Duty, if they shall come or be brought into the parts or places of the Kingdom, neither by the King's natural born Subjects nor by Aliens, they are not chargeable with the Duties mentioned in the Act.

2. If they are not brought into the Ports and Places of the Kingdom as *Merchandize, viz.* for sale, they are not chargeable with the Duty; but Wines or other Goods coming or brought into the *Realm* as *Wreck*, are neither brought into the Kingdom by any of the King's *Natural born Subjects*, nor by any *Strangers*, but by the Wind and Sea; for such Goods want a Proprietor until the Law appoints one.

3. *Wrecked Goods* are not brought into the Kingdom, being

Shep. versus Gosnold, Hill. 23, 24 Car. 2. Rot. 615. Vaughan, fol. 159.

being cast on shore, as Merchandize, viz. for sale, but are as all other the native Goods of the Kingdom, indifferent in themselves, for sale or other use at the pleasure of the Proprietor.

4. All Goods foreign or domestick are in their nature capable to be Merchandize, that is, to be sold; but it follows not thence, that wheresoever they are brought into the Kingdom, they are brought as Merchandize, and to be sold, and should pay custom; for they are transferred from place to place, more for other uses than for sale.

5. All Goods charged with the Duty of the Act, must be proprieted by a Merchant *natural born*, or Merchant *Alien*, and the greater or less Duty is to be paid, as the Proprietor is an Alien or Native Merchant; but wrecked Goods are not the Goods of any Merchant *natural born*, *Alien*, or *Denizen*, whereby the Duty payable should be either demanded, distinguish'd, or paid: therefore a Duty impossible to be known can be no Duty; for Civilly *what cannot be known to be, is as that which is not.*

6. All Goods subject to the Duty of Tunnage and Poundage may be forfeited by the disobedience and misbehaviour of the Merchant-Proprietor, or those trusted by him, *As unshipping before payment, or lawfully tendring or agreeing for, &c.* But wrecked Goods cannot be imported into any Creek or place of the Realm by way of Merchandize, and unshipped to be laid on land; for if so imported and unshipped to be laid on land, it is no Wreck, and therefore are not Goods forfeitable by the misbehaviour of any within the Act, and consequently not Goods intended to be charged with the Duties by the Act.

Goods drowned or lost in passing a Ferry, a great River, or an Arm of the Sea, are not to be said to be exported, though they be carried to Sea; but Goods exported are such as are conveyed to Sea in Ships or other Naval Carriage of mans artifice, and by like reason Goods imported must not be Goods imported by the Wind, Water, or such inanimate means; but in Ships, Vessels, and other Conveyances used by reasonable Agents, as Merchants, Mariners, Sailors, &c. Whence it may be concluded, that Goods or Merchandize imported within the meaning of the Act, can only be such as are imported with deliberation and by reasonable Agents, not casually and without reason; and

and therefore wrecked Goods are no Goods imported with-
in the intention of the Act, and consequently not to an-
swer the King's Duties; for Goods as Goods cannot offend,
forfeit, unlade, pay Duties, or the like, but men whose
Goods they are: And wrecked Goods have no Owners to
do those offices when the Act requires they should be
done, therefore the Act intended not to charge the Duty
upon such Goods.

The Admirals of England, *ut magnus Admirallus Angliæ, The very*
Hiberniæ, Walliæ, ac Dominicorum & Insularum earundem, words of the
Villæ Calisiæ & Merchiarum ejusdem, necnon Gasconia, Aqu- Lord Howard's
taniæ, classium & marium dictorum regnorum Angliæ præ- Patent, in 28
fectus generalis, &c. which are the words of their Patents *Eliz. in Rot.*
used at this day, do claim all Wrecks arising from any of *Admir. m. 10.*
those places, by virtue of their Grants.

X. King Edward the Second in the first year of his *1 E. 2. m. 6.*
Reign, by his Charter granted the Castle of Carisbrook, with *num. 6.*
all the Lands and Tenements in the Isle of Wight, former-
ly belonging to *Isabella Fortibus*, Countess of Albemarle, to
his great Favourite *Peter de Garveston* and *Margaret* his Wife,
and the Heirs of their two bodies begotten, (together
with sundry other Castles and Lands) and commanded
Nicholas de Bosco to put him into actual possession, and
likewise commanded *Robert de Sanson*, Keeper of the Fo-
rest of *Parkhurst* in that Isle, to be Intendent to them for
the Farm he had granted him for life for the custody
thereof, which being after soon re seized into the King's
hands, he granted this Castle with all its Services, and all
his Lands in that Isle to *Edward* his Son and his Heirs *Pat. 20. E. 2.*
Kings of England, and afterwards for the ascertaining *m. 10. intm*
what did of right belong to the same Castle, an Inquisi- *pro Edwardo*
tion went out, by which it was found *inter alia qd' wreck- filio Regis.*
hum maris pertinens ad dictum Castellum valet p ann 4 s. *Inquisit. de An.*
47 H. 3. n. 32.

So that by the general Patent of the Admiral will not
pass the Wreck of this Isle, without special words granted
in the Patent.

Note, If the Wreck happened, or was occasioned by *Leg. 3. §. 1. D.*
reason of any fault or negligence in the Master or Ma- *Naut. Caup. St.*
riners, the Master must make good the loss; but if the *lib. 1. §. 4. D.*
same was occasioned by the Act of God, to avoid an Ene- *de obl. & act.*
my or Pirate, and the like, there he shall be excused. *leg. 2. §. 6. D.*
mand. Quia
vis major pro-
videntiam & industriam humanam superat, nisi culpa casum præcesserit.

C H A P. VI.

Of Averidges and Contributions.

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| <p>I. Of Goods and Merchandize when subject to be cast over-board.</p> <p>II. Of the account rendred of such ejected Goods, and by whom.</p> <p>III. Of the Ancient Laws of England in reference to such Ejections.</p> <p>IV. What Goods must come into the Averidge, and what are exempt.</p> <p>V. The Master discharged by such AEs by the Common Law.</p> <p>VI. The Ships Gear or Apparel, whether within the Averidge.</p> <p>VII. The residue of the Goods where tacitly obliged to answer the Averidge.</p> <p>VIII. Of Goods remaining on ship-board spoiled by reason of the ejecting of others, where subject to the Averidge.</p> <p>IX. Where Ship and Lading are both</p> | <p>made liable to the Averidge.</p> <p>X. Of misfortunes not subject to an Averidge.</p> <p>XI. Where the remainder of the Goods are exempted from the Averidge, and the damage of the ejected Goods falls on the Master.</p> <p>XII. Damage to the Ship where the Lading contributes, and the Standard rate in Contributions.</p> <p>XIII. The Master becomes a Captive for the redemption of Ship and Lading, where liable to the Averidge, and where discharged.</p> <p>XIV. What Goods are subject to the Averidge.</p> <p>XV. Contribution for Pilotage, and where the remaining Goods not subject to Averidge.</p> <p>XVI. Rules general for settling the Averidge.</p> |
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Leg. Rhod. de jact.

Brañon, lib. 2. fol. 41. b. n. 3.

46 E. 3. fol. 15.

Leg. Oleron, cap. 8.

I. SHIPS being freighted and at Sea, are often subject to storms and other accidents, in which by the Ancient Laws and Customs of the Sea, in extreme necessity the Goods, Wares, Guns, or whatsoever else shall be thought fit, may in such Extremity be flung over-board; but then the Master ought to consult with his Mariners, who if they consent not, and yet the storm and danger continues, the Master may command notwithstanding the casting over-board what he shall judge most fitting for the common safety of the rest. So likewise Goods coming from infected Towns or Places may be cast over-board; and if an Action be brought at Common Law, the Defendant may justify the same, by pleading the special matter.

If there be a super Cargoe, a Request ought to be made to him to begin first; but if he refuses, the Mariners may proceed.

II. If the Ship so fortunes as to out-weather the storm, *Leg. Consolat.* and in safety arrives at her Port of discharge, the Master *del Mere.* and most of his Crew must swear that the Goods were cast over for no other cause but purely for *the safety of the Ship Leg. Wisbicens.* and Lading. The custom of clearing of that point varies *Artic. 38, 39.* according to the several Countries or Places they arrive at.

III. King *William the Conquerour*, and *Henry the first*, *Leges Guliel. 1.* made and ratified this Law concerning Goods cast over- *& H. 1. c. 98.* board by Mariners in a storm, in imitation of the Ancient *de peltis ad legem Rhodiam.* *Rhodian Law, De jact.*

Si ego fecero res tuas de Navi ob metum mortis, de Selden ad *hec non potes me implacitare, nam licet alteri damnum* *Kadmerum &* *inferre ob metum mortis quando periculum evadere non* *Nota & Spici-* *legium, fol. 183.* *potest. Et si de hoc me mescas, qd' ob metum mortis nil* *Whelock de* *scripsisse de comespriorat. Et ea quæ in navi restant divi-* *Pris. Anglorum* *dantur in communi secundum catalla, & si quis fecerit* *legibus, fol. 167.* *catalla extra navim quando necessitas non exegerit, ea res* *situat.*

IV. The Ship arriving in safety, the remainder must come into the *Averidge*, not only those Goods which pay *Leg. 1. & 2.* Freight, but all those that have obtained safety and pre- *ad leg. Rhod.* servation by such *Ejection*, even Money, Jewels, and *& leg. Oleron.* Cloths, and such like, are not exempted.

But those things which are born upon a man's Body, Victuals, and the like, put on ship-board to be spent, are totally excluded from the Contribution.

The Master ought to be careful that only those things *Leg. Wisbicens.* of the *least value* and *greatest weight* be flung over- *Artic. 20, 21.* board.

V. As this Law doth take care that this common Calamity should be born by all the parties interested by a general Contribution, so the *Common Law* takes notice of the misfortune, and makes Provision to indemnifie the *12 Jac. in B.R.* Master; and therefore if the Party-owner of such *ejected* *Bulstrode,* Goods, shall bring an Action against the Master or Own- *2 part, fol. 290.* ers of the Vessel, the Defendant may plead the special *Bird versus* *Astor.* matter, and the same shall bar the Plaintiff.

VI. But if the Ships Gear or Apparel be lost by storm, *Leg. 1. ff. de* the same is not within the *Averidge*, but is accounted like *exercit. action.* unto a Workman breaking or spoiling his Tools, except in the avoiding of a danger, as the flinging the *Master* over-

over-board, or the slipping the *Tow-Anchor* or *Boat*.

Goods brought secretly in the Ship against the Master or Purser's knowledge, if ejected, no Contribution is to be had.

*L. amissa &
Oleron.*

*Johannes Loc-
ninus l. 2. c. 7.
de jactu, & 8.
de contribu-
tione.*

This Order is observed generally in the rating the remainder of the Goods by way of Contribution.

If they chance to be cast over-board before half the Voyage performed, then they are to be esteemed at the Price they cost; if after, then at the Price as the rest or the like shall be sold at the place of discharge.

*Leg. 1. del Mer.
exempt. & leg.
Si non sortem
de cond. in de.*

VII. As the *Common Law* looks upon the Goods and Cargo as a pawn or pledge for the Freight, so the *Marine Law* looks upon them likewise as a security for the answering the *Averidge* and *Contribution*, and that the Master ought not to deliver the Goods till the Contribution is settled; the same being tacitly obliged for the one as well as the other. *Ad Leg. Rhod. l. 2. Si non conservatis.*

*Leg. Navis, 4.
ad Leg. Rhod.
And Vinius's
Commentary,
fol. 235.*

VIII. If through the rising of the Ship, or the casting or unlightning the Ship, any of the remaining Goods are spoiled either with wet or otherwise, the same must come in to the Contribution for so much as they are made worse.

*Leg. 9. §. 3.
ad exhib.*

IX. If it falls out that a Ship entering into a Port or Channel, cannot make way, and there be a lightning or disburdening of the Ship, then the Contribution falls two parts to the Lading, and one third to the Ship, except the Ship surpass in value the Lading, or that there is some bad quality in the Ship it self.

*L. 1. verf.
quod convenit
depos.*

But to prevent that ambiguous Question, if the party covenants that the Goods shall be delivered at the Port covenanted and appointed, then Condition makes Law.

So for the *Pilot's* Fee and rising of the Ship off ground when there is no Fault in the Master.

*Leg. quemad-
modum pa-
rag. Si navis
ad leg. Aquil-
lie.*

X. If two Ships happen to encounter and cross each other, and the Crew swear their Innocency, Contribution must be made by a just equality; but if one perishes, as there can be no proportion of the loss, so no Contribution. The reason that is given, for that otherwise a Skipper might of purpose set an old weak Ship against a strong Ship, and by that means hedge himself into a Contribution and Recompence. However this bars not the Owners from bringing their Action against the negligent Master,

by

by which means he may recoop himself in damage, if it happens at Sea, the Action by the Civil Law is called *Lex Aquilæ*. Eod. leg. 18 H. 6. num. 2. 3. Inst. fol. 146. Goodwyn versus Tompkins, Noy Rep.

If such a misfortune happens in the night at Sea, the party, if he will compleatly arm himself for his recovery, ought to prove, that he made out Light or Fire, or other ways gave notice by crying or calling out.

XI. If it falls out in the Ship or Vessel by the indiscreet stowing or lading thereof above the Birth-mark that such Ejection happened, in that case it has been used by the Marine Laws no Contribution to be made, but satisfaction is to be answered by the Ship, Master, or Owners. Lusi Sernus, §. 27. & Si. 23. ad leg. Aquil.]

XII. If to avoid the danger of a storm, the Master cuts down the Masts and Sails, and they falling into the Sea, are lost, this damage is to be made good by Ship and Lading *pro rata*: otherwise if the case happens by storm or other casualties. Ad. leg. Rhod. leg. 2. §. Si conservatis.

No Contribution is to be paid in case one Ship strike against another whereby damage happens, but full satisfaction is to be answered the Merchant in case of fault or miscarriage in either; or an equal division of the damage, in case it happen by a *casualty*, as above.

If a *Lighter* or *Skiff*, or the Ships Boat into which part of the Cargo is unladen for the lightning of the Ship, perish, and the Ship be preserved, in that case Contribution is to be made; but if the Ship be cast away, and the *Lighter*, Boat or Skiff be preserved, there no Contribution or *Averidge* is to be had, it being a Rule, No Contribution but *where the Ship arrives in safety*. F. de leg. Rhod. leg. navis onusta. leg. navis ad leg. Rhod. de jactu. Sir Francis Moore, fol. 297.

XIII. If a Ship happens to be taken, and the Master to redeem the Ship and Lading out of the Enemies or Pirates hands, promises them a certain sum of Money, for performance whereof himself becomes a Pledge or Captive in the custody of the Captor; in this case he is to be redeemed at the costs and charges of the Ship and Lading, and Money, if there be any in her, are contributory according to each man's interest for his ransom. Leg. Rhod. de jactur. l. 2. Si navis à Piratis.

So where a Pirate takes part of the Goods to spare the rest, Contribution must be paid. Moore, fol. 297. plr. 442. Hickey versus Palling-rou.

But if a Pirate takes by violence part of the Goods, the rest are not subject to *Averidge*, unless the Merchant hath made an express Agreement to pay it after the Ship is robb'd.

D d

But

Grot. de introd.
jur. Holl. par.
 29. *Sueton.*
jur. Naut. in
the end of the
thirteenth
Chapter.

But if part of the Goods are taken by an Enemy, or by Letters of Marque and Reprizal, *è contra*.

So likewise in storm, if the same is done for preservation of the remainder.

XIV. In Ejectment the Master or Purser of the Ship shall contribute for the preservation of the Ship, and also the Passengers for such Wares as they have in the Ship, be it Pearls, precious Stones, and such like; and Passengers that have no Wares or Goods in the Ship, yet in regard they are a burden to the Ship, Estimate is to be made of his and their Apparel, Rings, and Jewels, towards a Contribution of the loss; and generally all things in the Ship, except the Victualling and Provisions of the Ship, and the bodies of men (unless Servants) must bear a proportionable share in the Contribution.

The Estimate being made of the Goods lost and saved, the price is to be set down not for how much they were bought, but how much they might be sold for at the time when the Ejectment was made; and if anything be flung into the Sea and endamaged, and afterwards is recovered again, yet Contribution is to be made only for the damage.

XV. Contribution is to be paid for the Pilot's Fee that hath brought a Ship into a Port or Haven for her safeguard, (it being not the place she was designed for) so to raise her off the ground when there is no fault in the Master.

If a Master of a Ship lets out his Ship to Freight, and then receives his Complement, and afterwards takes in Goods without leave of the Freighters, and a storm arises at Sea, and part of the Freighters Goods are cast over-board, the remaining Goods are not subject to the Averidge, but the Master must make good the loss out of his own Purse.

The Goods which are lost are to be valued, and the Goods saved are to be estimated, which being known, a proportionable value is to be contributed by the Goods saved, towards reparation of the Goods *ejected*, or cast over-board.

In which, regard is always had, not to what might be got by the Goods lost, but what the intrinsic damage is by the loss of the same; the which are not to be estimated what they might have been sold for, as what they cost or were bought for

But

Peckeus ad leg.
Rhod. de jast.
fol. 196, 197,
198.

Grotius Introd.
jur. Holl. 3. 29.
Vinius and
Peckeus Com-
mentaries on
the Laws of
Rhodes, fol.
236.

Locinus, lib. 2.
cap. 8, 9, 10,
11.

But now the Custom is general, the Goods saved and lost, are estimated according as the Goods saved were sold for; Freight and other necessary charges being first deducted.

If there were Plate, Jewels, or the like, in a Trunk, Chest, Pack or Bale, at the time of their Ejection, if there be a *super Cargo* he ought to give notice by discovering of the same to the Master or Mariners, otherwise he shall be answered in the Contribution no more than the bare extrinsic value appeared to be; but the Assurers will hardly fare so well.

If Contribution shall be settled, and the Merchant will not agree, the Master may detain the Lading, for the same is as tacitly obliged to answer that as the Freight; and if at the *Common Law* the Merchant should bring an Action, the Defendant shall bar him by pleading the special Matter,

If Goods are cast over-board, and afterwards are recovered, Contribution ceases saving for so much as they are damaged and made worse by reason of such Ejectionment.

Note, Goods cast over-board to lighten the Ship make no *Derelict*.

And though such necessity seems to subject the Lading to Ejectionment to prevent the ruin and destruction of the Persons, yet some Lading seems excepted, and therefore Cannon and other Instruments or Provisions *consigned to relieve a City*, ought not to be flung over-board; for in such case the Law imposeth on every Subject, that he prefer the urgent Service of his Prince, before the safety of his Life.

The Custom of Places varies this. *Modus* of estimating, the which is done by Merchants and Mariners indifferently nominated by the Court. *Ad Leg. Rhod. §. ult. Instit. de rer. divis. & leg. 9. §. ult. de acq. rer. Dom.*

ff. ibid. leg. Navis, §. cum autem.

Leg. 25. D. de prob. leg. falsus §. Si jactum. D. de furt.

Bacon Max. fol. 17. privilegium non valet contra rem publicam.



C H A P. VII.

Of Policies of Assurance.

- I. *Assurances by whom first introduced.*
- II. *Assurances the nature of them.*
- III. *How esteemed of by Law.*
- IV. *The various ways of insuring, and on what.*
- V. *Assurance when esteemed most dangerous, and of fraudulent Policies.*
- VI. *Of the Receipt of Premio, and the custom of Abatement on losses.*
- VII. *Policies that now ensure against all the accidents of Heaven and Earth.*
- VIII. *A Ship ensured generally, whether the same includes the Cargo; and whether it is necessary in the Policy to mention the particular Goods.*
- IX. *If the Master is discharged of the damage, whether the Ensurer may be made liable.*
- X. *A Ship ensured from a Port, and she is burnt before her departure, whether the Assurers are made liable.*
- XI. *Goods ensured in one Ship, are afterwards in the Voyage put into another, the second miscarries, whether the Assurers are made liable.*
- XII. *A man ensures more than the value of the Cargo, the Custom in such case.*
- XIII. *A Ship is ensured from one Port to another, and there to be landed; the Cargo after arrival is sold, and before landing is burnt, whether the Assurers shall be made answerable.*
- XIV. *A Ship ensured from one Port in (blank) being in time of War taken, whether the Assurers shall answer.*
- XV. *Of the Ensured's renouncing after a loss; and what operation the same has by custom.*
- XVI. *Of the Office erected by the Statute of 43 Eliz. what power; of the Jurisdictions claimed by those of Common Law and the Admiralty.*
- XVII. *What Power and Authority was given by the Statute of 43 Eliz. to that Court.*
- XVIII. *What things it was deficient in, and holpen by the Statute of 14 Car. 2. cap. 23. and of their Authority and Power general at this day.*
- XIX. *Of the advantages that seem to accrue to publick Assurances, different from private ones.*
- XX. *The Office of Insurance for Houses burnt or demolished by, or by reason of Fire: the Fund to answer the Premium, and the rates for insuring*

*In vita Claud.
Cæsar. lib. 25.
cap. 18.*

** Leg. 1. ff qui
Satisfd. cog.
Grotius de Jure
Bell. ac Pacis,
lib. 2 cap. 12.
§. 3 in fn.*

I. IT is conceived by Suetonius, that Claudius Cæsar was the first that brought in this custom of Assurance, by which the danger and adventure of Voyages is divided, repaired and born by many persons, who for a certain sum, by the Spaniard called Premio, assure Ship or Goods, or both, or a Proportion, according as the Policy is *.

II. Assurances are either publick or private. Publick, when

when they are made and entred in a certain Office or Court, commonly called the *Office of Assurance* on the *Royal Exchange* in *London*; and the same are called *publick*, for that it is free for any man to resort and see what another hath assured upon his Adventure.

Private is, when an *Assurance* is made, but the Ensured keeps the same secret, not deeming it fit that any should see or know their *Cargo* or Adventure, or what *Premio* they have given, or assurance they have made; and the same being never entred in the Office, is known by the name of a *Private Assurance*.

III. By the *Common Law* they are both of the same validity, as in reference to obtain satisfaction from the Ensurers, if loss or damage should happen to the Adventure.

But by the proceedings erected by *Statute of 43 Eliz. cap. 12.* only those that are entred in the Office of that Court, can be sued or determined there. 43 Eliz. c. 12.

IV. *Assurances* are of various sorts, some being to places certain, others general: those that are made to places certain, are commonly upon Goods laden or to be laden aboard outward, and until the same Adventure shall be laid ashore at such a Port. Leg. 4. s. D. de Naut. s. 2.

Or upon Goods laden or to be laden homeward in such a Ship till the Adventure shall likewise be landed.

Or else upon Goods out and in, with liberty to touch at all Ports as are mentioned in the Policy. Johannes Locinius, l. 2. c. 5.

So likewise on Ships that go Trading-Voyages, as round to *Cales*; and that it shall be lawful after the Ships delivery there, to take in at the same Port another Cargo, and with that proceed to the *West-Indies* or other parts, and back again to *Cales*, and from thence to *London*; this Policy being general and dangerous, procures seldom subscriptions, or at least very chargeable ones. S. 5, 6.

As Goods and Merchandize are commonly ensured, so likewise are the Ships Tackle and Furniture; but in regard there seldom happens a Voyage but somewhat is missing or lost, the *Premio* commonly runs higher than for Merchandize. Santor. p. 3. num. 13. seq. 43. seq.

Assurances may be made on Goods sent by Land, so likewise on Horses, and the like, and may be made on the heads of men; as if a man is going for the *Streights*, and perhaps is in some fear that he may be taken by the *Mores* or *Turkish*. Lisle ver. Sedgwick. Mich. 29 Car. 2. in B. R.

Turkish Pirates, and so made a Slave, for the Redemption of whom a ransom must be paid, he may advance a *Premio* accordingly upon a Policy of Assurance; and if there be a Caption, the Assurer must answer the Ransom that is secured to be paid on the Policy.

If such Ensur-
ance be made
in the Office,
they then set
down the
hour when
intimation is
given of the
loss.

Locinius, lib. 2.
cap. 5. §. 9, 10.

Arthur Stock-
den's Case,
Mich. 26 Car.
2. in B. R.
Afterwards
convicted by
Information
for the fraud,
Term. Sancti
Hilarii sequen-
in B. R. Vide
Liv. lib. 25.

V. Those Assurances are most dangerous when there are these words inserted *lost or not lost*; which is commonly done when a Ship hath been long missing, and no tidings can be had, the *Premio* (especially in time of War) will run very high, sometimes 30 or 40 *per Cent*'; and though it happens at the time that the subscription is made, the Ship is cast away; yet the Assurers must answer.

But if the party that caused the Assurance to be made, saw the Ship wreckt, or had certain intelligence, such subscription will not oblige, the same being accounted a meer fraud.

So likewise if the Assured, having a rotten Vessel, shall assure upon the same more than she is worth, and afterwards give order that going out of the Port, she should be sunk or wreckt, this will be fraudulent: and not oblige the Assurers to answer.

In the Year 1678. one *Nounham Perkins* and *Stoakes* were Owners of a Vessel called the *May Flower* Ketch, the Vessel coming laden with Wines on the account of one *Fierbrasse* and *Stone* to the *Isle of Wight*, *Perkins* being then in the same place, contrives with one *Ivy* the Master to sell the Freighters Goods privately, and that being effected, to go out to Sea some small distance from the *Isle*, and there privately sink the Vessel, and pretend she struck, and then foundred by the extremity of Weather. The Plot being laid, *Perkins* hastens up to *London*, and makes a Policy of Assurance on the Vessel; which being done, remits his Ordersto *Ivy* to put in execution the contrivance, and accordingly the Goods, or the best of them, being disposed of, it stands out to Sea, and then with his own hands, by the force of an Iron Crow, makes a hole in the hold, and then in his long Boat (the Crew perceiving the Vessel to be sinking) conveys himself and Mariners ashore; *Ivy* remits up advice of the loss, and *Perkins* (as if he had never known any thing of the matter) demands the monies assured with great confidence, and thereupon brings an Action for the same; but before that Cause came to a Tryal,

Tryal, Fierbrasse and Stone bring a Trover against Perkins, and thereupon the whole practice came out, and a Verdict was had against the Defendant, with this further, That if Perkins would proceed on his Actions on the Assurance, he must expect that this practice and fraud of his would totally poison his Assurance, and thereupon being well advised, never proceeded.

Hill. 3. 32 Car.
2. B. R.

VI. Few or scarce any ensure the whole Ship, but the subscriptions being for summs certain, as 50 *l.* or 500 *l.* at the Premio then current, which when the Adventure is born they receive; but if a loss happens, the Premio is deducted together with the usual abatement: so that the Ensured receive much about 80 per Cent. if a loss happens.

The Subscription mentions as if the Premio had been actually received, but it is seldom done till the Adventure is born.

VII. The Policies now adays are so large, that almost all those curious Questions that former Ages, and the Civilians according to the Law Marine, nay, and the common Lawyers too, have controverted, are now out of debate; scarce any misfortune that can happen, or provision to be made, but the same is taken care for in the Policies that are now used; for they ensure against Heaven and Earth, stress of Weather, Storms, Enemies, Pirates, Rovers, &c. or whatsoever detriment shall happen * or come to the thing ensured, &c. is provided for.

*ut que in na-
ves imposui-
sent, ab hostium
tempestatisque
vi publico peri-
culo essent. Ne-
gotiatoribus
certa lucra pro-
posuit suscepto
in se damno,*

*si cui quid per tempestates accidisset, Livius, lib. 23. cap. 25: Vide Lælius in Commentario ad Digesta tit. pro Socio, num. 25. * Sub nomine periculi, de quo fit cautio, comprehenditur omnis casus qui accidit in mari, à tempestate, ab hostibus, prædonibus, reprisaliis, ut vocant arrestis aliisque modis usitatis & inusitatis circa fraudem & culpam contrahentium, aut domini mercium vel navis. Grotius, de Jure Holl. part. 24.*

VIII. If a Merchant ensures such a Ship generally, and in the Policy it is expressed of such a Burthen, the Ship happens then to be laden and after miscarries, the Ensurer shall not answer for the Goods, but only for the Ship.

Locinius, lib. 2.
cap. 5. §. 7, 9,
10.

IX. It matters not in the Policy whether the particular Wares and Goods are named, but generally upon the principal Wares, and all other Commodities laden or to be laden for the Ensured, or for his account, or for any other.

X. If a Ship be Ensured from the Port of London to Calcutta, and before the Ship breaks ground takes fire, and is burnt, the Assurers in such case shall not answer, for the Adventure

ture begun not till the Ship was gone from the Port of London; but if the words had been, *at and from the Port of London*, there they would upon such a misfortune have been made liable.

Note, The Port of London extends from the North Foreland in the Isle of Thanet, over in a Line to the Naze in Essex, and from thence to London-Bridge Rot. *Seacar. 19 Car.*

2.
7 H. 6. 14. in
Quare impedit,
5 R. 2. Tryal
54.
34 H. 2. tit.
107.

Mich. 30.
31 Eliz.

*That has been much doubted, and opinions of the Court have generally inclined against the Assurers. *Leg. ut. ad Rbod. Digest. Paulus. lib. 14. tit. 2. §. 10.*

Vide Grot. Intro. Jur. Holl. 212. 23. And indeed is more the Custom of Merchants than Law.

If such an Assurance had been from *London to Cales*, and the Ship had broke ground, and afterwards been driven by storm to the Port of *London*, and there had took fire, the Ensurers must have answered; for the very breaking of ground from the Port of *London* was an inception of the Voyage.

On the other hand, if a man at *Cales* ensures a Ship from thence to *London*, if a loss happens, the Assurer, if he comes into *England*, shall answer by the *Common Law*; for though the place where the Subscription was made, and the *Premio* given was in a Foreign Country, yet that is not material, for the Action that is brought is grounded on the Promise which is transitory and not local, and so it was adjudged where the Defendant in consideration of 10*l.* had ensured, that if the Plaintiff's Ship and Goods did not come safe to *London*, he would pay 100*l.* afterwards the Ship was robbed on the Sea, and in an Action brought for the 100*l.* the Plaintiff had Judgment, notwithstanding the Robbery or Loss was on the main Sea, and the Subscription out of the Realm.

XI. If Goods are ensured in such a Ship, and afterwards in the Voyage it happens she becomes leaky and crazy, and the *super Cargo* and Master by consent become Freighters of another Vessel for the safe delivery of the Goods; and then after her relading, the second Vessel miscarries*, the Assurers are discharged: But if there be these words, *The Goods laden to be transported and delivered at such a place by the said Ship, or by any other Ship or Vessel, until they be safely landed*, then the Ensurers must answer the misfortune.

XII. If a man ensures 5000*l.* worth of Goods, and he hath but 2000*l.* remitted, now he having ensured a real Adventure, by the Law Marine all the Assurers must answer *pro rata*, if a loss. But by the opinion of some, only those first Subscribers who under-writ so much as the real Adventure amounted to, are to be made liable, and the rest remitting their *Premio* 10*s.* per Cent. deducted out of the same for their Subscriptions, are to be discharged.

XIII. A

XIII. A Merchant Ensures his Goods from *London* to *Sally*, and there to be landed; the Factor after arrival, having opportunity, sells the Cargo aboard the same Ship without ever unlading her, and the Buyer agrees for the Freight of those Goods for the Port of *Venice*; before she breaks ground the Ship takes fire, the Assured and Buyer are absolutely without remedy; for the property of the Goods becoming changed, and Freight being contracted *de novo*, the same was as much as if the Goods had been landed.

Locin. l. 2. c. 5. §. 9. And by the Laws of *Antwerp* there is a time allotted after the Ships arrival at her Port how long the Adventure is to be born by the Ensurers, which is about 15 days. *Art. 13. Assur. Antwerp.*

And so it is if the Factor after her arrival had contracted for Freight to another Port, and the Ship had happened to take fire, the Assurers are hereby absolutely discharged for ever.

XIV. If a Ship be ensured from *London* to and blank being left by the Lader to prevent her surprize by the Enemy, in her Voyage she happens to be cast away, though there be private Instructions for her Port, yet the Ensured sit down by the loss by reason of the uncertainty. So a blank is left in the Policy for the value of the Ship or Lading, if a loss, and there be not words that may suppose the Ensured may endanger the Policy.

Case of Monsieur Gourdan Governour of Cales, Anno 1585.

XV. After notice of loss, the Ensured, (if he doth think fit) for that he hath Ensured the most of his Adventure, or that he would have the assistance of the Assurers; when there is hope of recovery of the Adventure, he may then make a Renunciation of the Lading to the Assurers, then he comes in himself in the nature of an Ensurer, for so much as shall appear he hath born the Adventure of beyond the value Ensured.

Locinium, lib. 2. cap. 5. §. 8.

But if the Merchant shall not renounce, yet there is a power given in the Policy for him to travel, pursue and endeavour a recovery (if possible) of the Adventure after a misfortune to which the Assurers are to contribute, the same being but a trouble to give ease to the Assurers.

If prohibited Goods are laden aboard, and the Merchant ensures upon the general Policy, which always contains these words; *Of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Fettesons, Letters of Mart, and Countermart, Arrests, Restraintments and Detainments of Kings and Princes, and all other Persons, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes what-*

Sub nomine periculi, de quo fit cautio, comprehenditur omnis casus qui accidit in mari, à tempestate, ab hostibus, prædonibus, reprisaliis, ut vocant arrestis, aliisque modis usitatis citra fraudem, & culpam contrahentium aut domini mercium vel navis. Grotius de Introd. Jur. Holl. par. 24. In hoc contractu bona fide versandum est, ut natura ultro citroque obligationis postulat. Locinius, lib. 2. cap. 5. §. 8.

Isaac Houbland
versus Edmund
Harrison. Hill.
31, 32 Car. 2.
in B. R. Judg.
in Pasch. seq.

whatsoever they be, and howsoever they shall happen or come, to the hurt and detriment of the Goods and Merchandize, or any part or parcel thereof; whether if such Goods be lawfully seized as prohibited Goods, the Ensurers ought to answer? It is conceived they ought not; and the difference hath been taken, where Goods are lawful at the time of Lading to be imported into that Countrey which they are consigned for; but by matter *ex post facto* after the lading they become unlawful, and after arrival are seized, there the Assurers must answer, by virtue of the Clause, *And all other Perils, &c.* But if the Goods were at the time of lading unlawful, and the Lader knew of the same, such Assurance will not oblige the Assurers to answer the loss; for the same is not such an Assurance as the Law supports, but is a fraudulent one.

A Policy was made from Cadiz to the *Vera Cruze* in New Spain upon monies lent upon Bottomry, and upon any kind of Goods and Merchandize whatsoever loaden aboard the good Ship called the *Noustra Señora del Carmen* and *Mary Magdalen*, the Adventure beginning immediately from the lading before a day to come, and the Monies from the time they were to be lent, and so to continue from Cadiz to *Vera Cruze*, and after delivery, with Proviso to stay at any Port or Place in her Voyage, and likewise to touch at *Porto Rico*, and there to lade and unlade without any prejudice to the Ensurance, the Cargo being valued at 1700 l. sterl. without account, &c. against Seas, Men of War, Fires, Enemies, Pirates, Rovers, Thieues, Fetterzons, Letters of Mart and Countermart, Surprizals at Sea, Arrests, Restraints and Detainments of all Kings, Princes, and People of what Nation, Condition, or Quality soever. The Ship being laden at Cadiz, did depart towards New Cruz, and before arrival there, touching at *Porto Rico*, the Goods were there seized and arrested in an Action brought upon the Policy, the Defendant came in and pleaded, That the Ship at her arrival in her Voyage at the Port of *Rico*, was laden with Goods and Merchandize prohibited, and the same and also the Ship did there become forfeited by default of the Proprietors, and was there seized and taken. The Question was, if the Owners should ensure, and then order prohibited Goods to be laden, whether that an Arrest upon the same should en-

titled

title them to a Recovery. The second Objection was, If (as the Defendant had pleaded this Plea) the same were good? As to the first, the Court did all incline, that the Ensurance ought to be *bona fide*; i. e. the restraint ought to be of such Goods as by Law were not restrainable, but surely that cannot be; for the intention of Policies are to warrant the Perils of all manner of Goods in all manner of Cases. So that if there be a loading *bona fide*, be it prohibited or not, the same in case of loss ought to be answered, unless it were a fraudulent contrivance: But to the second it was resolved, That the Plea was insufficient; for admitting the same should not oblige the Ensurer; yet because the Defendant did not shew that the Goods were laden either by the Ensured, or by their Factor or Order, otherwise the same should not conclude them; for perhaps the Master or his Mariners, or a Stranger, might load them on board without order; so that upon the meer insufficiency of the manner of pleading, and not of the matter, the Court gave Judgment for the Plaintiff.

Like Judgment was given against Lethbridge adf. Houbland, Trin. 32 Car. 2. in B.R. Rot. 168.

But if a Merchant will Freight out Wool, Leather †, † 12 Car. 2. and the like, or send out Goods in a Foreign bottom*, cap. 32. and then make a Policy, the Ship happens afterwards to be taken, by reason of which there becomes a Forfeiture of Ship and Lading, the Ensurers are not made subject to answer the damage; for the very foundation was illegal and fraudulent, and the Law supports only those Assurances that are made *bona fide*; for if otherwise, and men could be ensured against such Actions, they would destroy Trade, which is directly to thwart the Institution and true Intentions of all Policies.

But if Goods should happen to be lawfully Ensured, and afterwards the Vessel becomes disabled, by reason of which they relade by consent of the *super Cargo* or Merchant, into another Vessel, and that Vessel, after arrival, proves the Ship of an Enemy, by reason of which the Ship becomes subject to seizure; yet in this case the Ensurers shall answer, for that this is such an accident as is within the intention of the Policy.

Ritterssh. ad leg. contract. 23. de Reg. jur. cap. 18. pag. 236, 237. Stypman dist. loco, num. 335.

Several men lade aboard Salt, without distinction, not putting them in Sacks, and the like; the Ship arrives, the Master delivers to their Principals according to their Bills

*Inst. in pr. quib.
mod. rer. con-
trah. ob. te. l. 2.
Si cert. peti.*

Bills of Lading as they come one by one, it falls out that some of the Salt is wash'd or lost by reason of the dampness of the Ship, and that the two last men cannot receive their Proportion. There are in this case these things to be considered :

1. Whether the Master is bound to deliver the exact quantity?
2. Whether those that have received this loss can charge the Assurers?
3. Whether the Assurers can bring in the first men for a Contribution, they having their Salt delivered to them compleatly.

*Hill. 11 Jac.
in C.B. Laflaw
and Tomlin-
son's Case, Ho-
bart, fol. 88.
Leg. quod con-
venit de verb.
ob.*

Certainly the Master is not bound to deliver the exact quantity, nor is he obliged to redeliver the very specifical Salt, but only as men are to repay Money or Corn by the distinction in a Bag or Sack, and out of them; but if the fault was in not pumping, keeping dry his Deck, and the like, there *è contra* : though perhaps there may be special agreement.

Besides, this is a peril of the Sea, which the Master could not prevent, and of necessity he must deliver to one first before another.

As to the second, It is no question but that the Assurers shall answer. But whether they shall bring in the first men for contribution, may be some doubt.

It has been conceived by some, that they ought not; for they delivered their Salt to the Master *tanquam in Creditum*, and was not to expect the redelivery of the same specifical Salt : Besides, the Master must of necessity deliver to one man before another.

*D. Leg. in mo-
nave.*

But by others it has been conceived they ought to contribute *pro ratione*; for as Goods of necessity some must be stowed in the Hold, and that such Goods seldom escape the peril of the Sea, so the rest must of necessity contribute to that misfortune, and so make no distinction.

The Bills of Lading are very useful to settle the difference between the Assurer and Assured, of which there are three parts, one sent over Sea, the other left with the Master, and the last remaining with the Lader.

XVI. The Office of Assurance was erected by the Statute of 43 Eliz. cap. 12, which reciting, ' That whereas
' disse-

'differences growing upon Policies of Assurances had been ordered by discreet Merchants approved by the Lord Mayor, who did speedily decide those Causes, until that of late years divers persons did withdraw themselves from that Arbitrary course, and have sought to draw the parties assured to seek their Monies of every several Assurer by Suits commenced in her Majesties Court to their great charges and delay: Whereupon it was Enacted, That the *Chancellor* or *Keeper* for the time being should issue forth a standing Commission (to be renewed yearly, or as often as to him shall seem meet) for the hearing and determining of all such Causes arising on Policies of Assurance as shall be entred in the Office of *Assurance* in *London*.

The Judges or Commissioners appointed, are the Judge of the Court of Admiralty, the Recorder of *London*, two Doctors of the *Civil Law*, two common Lawyers, eight grave and discreet Merchants, or to any five of them; and that they, or the greatest part of the Commissioners have power to Hear, Examine, Order, and Decree all such Causes in a brief and summary way without formality of pleading.

They have power to summon the parties, examine Witnesses upon Oath, commit to Prison upon refusal of obedience to their Decrees; they are to meet once a Week at the *Assurance*-Office, or some other convenient publick place, and no Fees at all are to be exacted by any person whatsoever.

There lies an Appeal from their Sentence to the Lord Chancellor or Lord Keeper (but the party must deposite the Monies decreed, and then (though the party be imprisoned, he may be discharged) and then it lies in the Lord *Chancellor's* or *Keeper's* breast to affirm or reverse, and to award the party assured double costs.

No Commissioner being party Assurer can act by virtue of this Commission, nor until he hath taken his corporal Oath before the Mayor and Court of Aldermen, to proceed uprightly and indifferently between party and party.

XVII. This was a good Act, had it been as carefully penn'd as was intended; for there were many things which this Act did not extend to.

First, Any man may at this day make a private Policy notwithstanding

notwithstanding this Act, which is as good and effectual in Law to all intents and purposes, as one made and entered in the said Office; and that such a Policy might and may be now sued at the *Common Law*.

Secondly, The number of Commissioners being so great, that there could be no Court without five at the least; and without a Court they neither could summon parties, or examine Witnesses, and that was very difficult to get.

Thirdly, If the Parties or Witnesses refused to appear, they had no power to punish the Party for the delay, with Costs or otherwise, which was very mischievous.

Fourthly, No Commissioner could sit before he was sworn: Commissions and the Commissioners being often renewed, it was a trouble to be attending a Court of Aldermen, which was difficult sometimes of the year to get.

Fifthly, though they had power to commit the party who refused to obey their Decree, yet they had no power to make any Order against the Ship.

* 14 Car. 2.
cap. 23.

Which matters being taken into consideration, it was Enacted *, That three Commissioners, whereof a Doctor of the *Civil Law*, and a Barrister of five years standing to be one, should make a Court, and to act as any five before might have done.

They have likewise power now given them to summon Parties and Witnesses, and upon contempt or delay in the Witnesses upon the first summons and tender of reasonable charges: and in the Parties upon the second summons to imprison Offenders, or give Costs.

Every Commissioner is now to take his Oath before the Lord Mayor to proceed uprightly in the execution of the said Commission; and any of them may administer an Oath so as the adverse Party may have notice, to the end such Person may be fairly examined.

Commissions may issue out of the Court of Admiralty for examining of Witnesses beyond Seas, or in remote places by directions of the Commissioners, and Decrees may be made against Body and Goods, and against Executors and Administrators, and Execution accordingly; and assess Costs of Suit as to them shall seem just.

But Execution cannot be against Body and Goods for
the

the same debt, but the party must make his election as at the *Common Law*.

XVIII. But these Statutes took not away that Cognizance which the Courts at *Westminster* claimed upon such Contracts by the *Common Law*; but only gave this new erected Court a concurrent Jurisdiction with those at the *Common Law*: for though the loss happened out of the Realm, yet they had Jurisdiction of the Cause. And therefore if an Action is brought upon a Policy of Assurance, though the loss happened at Sea, yet the Jury shall enquire; for the loss is not the direct ground of the Action, but the *Assumpsit*.

Oyles versus Marshal, Styles Rep. 1654.

Dowdales Case, Coke lib. 6. fol. 47. 36 Eliz. in B. R.

The Admiralty have likewise put in, if not for an absolute Jurisdiction, yet at least a concurrent one; yet both have been denied them, notwithstanding that the Judge of the Admiralty is Judge of the Court of Assurance.

38 H. 8. Crane and Beil. Coke 4. Instit. fol. 138, 139.

XIX. By the making of an Office-Policy according to the Statute, *these Advantages will follow.*

1. If the Policy be lost, if the same be entred with the Register of the Office, the Entry is effectual to answer the matter both at the *Common Law*, as well as in the same Court; but a private Policy lost is like a Deed burnt, unless that there be very strong Evidence, as a Copy, and the like, it will be of little value. So that then there will remain nothing but an equitable relief in *Chancery*, for the satisfaction of the party.

2. If a man freights out a Ship from *London* to *Cales*, and assures here, he may write to his Correspondent to make an Assurance there of the same; if the matter comes before Commissioners, they may examine the Ensured upon Oath, and determine therein according to Law and the Custom of Merchants: But at the *Common Law* the same cannot be, but relief must be had in that point according to Equity in *Chancery*.

3. The same is a Court of *Equity* as well as a Court of *Law*; so likewise a Court to adjudge according to the Custom of Merchants.

4. They may decree against twenty Assurers at one time, but at Law they must be sued distinctly.

5. They may proceed out of Term as well as in Term, and (if the matter will bear it) they may finish a cause in a fortnight's time, and less.

6. The

6. The Judgments there given are generally upon mature deliberation, and by persons well skilled in Marine affairs; and if their Sentence is thought to be unreasonable, the Lord Chancellor or Lord Keeper may on Appeal determine the same.

7. The Parliament hath had so special a regard to the Judgments given in this Court, that no Appeal from thence can lie till the whole monies decreed are deposited, and the full costs paid to the Appellee; which is more expeditious and advantageous than having of Bail at the *Common Law*; for in such a case, after the Plaintiff hath spent his Monies, and been delayed three or four Terms, and with much difficulty and charge got Judgment, the Defendant or his Bail may render him to Prison in discharge of themselves. So that although this Court cannot compel the Defendant to put in Bail, yet the Sentence there being so swift from which there is no Appeal till the Monies are paid down, the same seems to be of great convenience to the Assurers as well as the Assured.

XX. There is another Office of Insurance, but that is for Houses burnt or demolished; for the securing the Ensured in case of *Loss*, Ground-Rents to the value of near 3000*l. per Annum*, are settled on Trustees to answer the same. The *Premium* or rate of Ensuring an hundred Pounds on Brick-Houses, is Eight Shillings for one year, (and double for Timber) and so in proportion for a lesser sum; and if any Insure for a longer Term, the Discount for paying down the Money, is after this rate; Three years and a quarter is paid for four years Insurance; five for seven years, and seven for eleven. The Money Ensured on the House is to be paid as often as the House is burnt or demolished within the term ensured, but if damaged, then to be repaired at the Charge of the Office. This excellent Security for such misfortunes, His Majesty has highly approved of in Council, and for the better encouraging the Undertakers and first Inventers, has been lately graciously pleased to grant his Letters Patents to them for carrying on so great and good a Work for the good of the Publick.

C H A P. VIII.

Of Prifage and Butlerage.

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|---|---|
| <p>I. What Prifage is, and where taken, and of what.</p> <p>II. Merchant Strangers exempted from the same.</p> <p>III. When due, and the exemption of the Citizens of London from the same.</p> <p>IV. What Citizens are capable, and where not.</p> <p>V. A Foreigner imports and makes a Citizen Executor and dies; whether he shall have the benefit of the Immunity.</p> <p>VI. Where a Foreigner sells to a Citizen before, but he broken, the</p> | <p>Vendee shall be chargeable.</p> <p>VII. Where a Grant to discharge a particular Ship shall be good; and where a Grant to particular persons shall be otherwise.</p> <p>VIII. Of Butlerage, what, and who are exempted.</p> <p>IX. Where the King becomes entituled to those duties.</p> <p>X. A Grant to be free of all Customs, Impositions, &c. extends not to Prifage and Butlerage.</p> <p>XI. Cinque-Ports exempted from Prifage.</p> |
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Prifage is a certain taking or purveyance for Wine to the King's use; the same is an ancient Duty which the Kings of *England* have, time out of mind, had and received; the manner hath been by taking of every Ship or Vessel that should come into this Realm, if ten Tun, to have for Prifage one Tun: and if it contain 20 Tun or more, to have two Tun (*viz.*) *unum ante dolium*, and the other *deorsum*, paying 20 s. for each Tun. This ancient Immunity they have enjoyed as a Flower of the Crown, and by some has been conceived not grantable away without Act of Parliament. But yet in 6 E. 3. fol. 3. Case 15. mentions the same to be grantable over.

II. King *Edward* the First having laid some Impositions on the Merchants, which in *Anno* 25. of his Reign, being taken away with promise, that neither he nor his Successors should do any such thing without Assent of Parliament. In the one and thirtieth of his Reign they granted him an increase of Customs; in lieu of which he granted them many Immunities, as Release of *Prifage*, &c.

III. *Prifage* is not due till the unlading, or that which is commonly called breaking of Bulk; for the words are,

E e

D e

Dyer 92. 42.
165.

Fleta, l. 2. c. 21.

Rot. Parl. 31 E.
1. cap. 1, & 2.

Trin. 5 Jac. in
B. R. Kennycot
and Boggen's
Case.

De qualibet navis important vna, & difonerant inde. King Edward the Third by his Charter dated 6. Martii Anno Regni primi, granted his Royal Charter of difcharge to the Mayor, Commonalty, and Citizens of London, in hæc verba, (viz.) Quod de vinis Civium nulla prifa fiat, fed perpetue inde effent quieti, &c. which was afterwards allowed in the Exchequer.

4 H. 6. Knowles
Case.

IV. It is not every Citizen that is capable of this Privilege, but only thofe that are refident within the City: And fo it was Rul'd in the Cafe of one Knowles, who being a Citizen and free Grocer of London, removed his Houfhold cum pannis, and did dwell at Briftol, but yet kept his Shop in London; and a Ship of his arriving with Wines at London, and being unladen, the Prifage was demanded; he claimed the benefit of difcharge. It was adjudged, he was not capable of the fame: for he that will claim the benefit of this difcharge, ought to be Civis incola commorans.

Hill. 43 Eliz in
B. R. Rot. Attor-
ney General
verfus Sache-
weil and
Sneed.

Waller verfus
Hanger, Bul-
firod. 3. part.
fol. 1.

By 24. H. 6. (a private A&t of Parliament) Complaint was made, That the Lord Mayor of London would make Strangers Citizens; it was there declared, That this benefit to be difcharged from payment of Prifage, did not extend to fuch Citizens as were dotati, made free, but unto thofe Citizenonly which commorant, incolant, and are refident in the City.

V. If a Foreigner brings a Ship laden with Wines into the Port of London, and then makes a Citizen his Executor and dies, he fhall not have the benefit of this Immunity from payment of Prifage for thefe Wines, for that they are not bona Civium.

VI. If a Foreigner arrives with a Ship laden with Wines at a Port with an intent to unlade, and before the Goods are entred, or Bulk is broken, he fells them to a Citizen. Prifage fhall be paid notwithstanding, for it was never the Kings Grant to difcharge a Citizen in fuch a manner.

VII. If the King does difcharge fuch a Ship of J. S. being at Sea, particularly naming the fame, from the payment of Prifage, and he dies before the Ship arrives, no Duty can be demanded.

Hanger's Cafe,
Hill. 13 Jac.

But it has been held, If a particular Perfon has a Grant to him to be difcharged of his Goods, and he dies before the arrival, the Duty fhall be paid.

Quo Warranto's were brought against three Archbishops of York, to shew cause why they demanded to have *Prisage* for Wines brought into the Port of Hull: The two first pleaded to have only the first taste, and a pre-emption after *Prisage* paid; but the third pleaded a Charter of 15 E. 2. by force of which he claimed the same, and Rul'd not good. For though the Charter might be good, yet it was held in that case, a disclaimer by the Predecessor should bind the Successor. Note, at this day the Duke of Ormond in Ireland hath an Inheritance in the *Prisage* of Wines by the Kings Charter.

Bro. tit. disclaimer, fol. 47.

6 Ed. 3. fol. 5, 6. Archbishop of York's Case.

Sir John Davies in the case of Customs.

VIII. *Butlerage* is a Custom due from Merchant-Strangers of 2 s. upon every Tun of Wine brought into this Realm by them; but English men pay it not.

King John granted to the Merchants of Aquitain Trading for Wines thence into England divers Liberties, amongst others, *Libertatibus concessis Mercatoribus vinetariis de Ducatu Aquitanie reddendo Regi & heredibus suis 2 s. de quolibet dolio vini ducti per eosdem infra Regnum Angliæ vel potestatem Regis.*

In libro Rubro in Scaccario Remem. fol. 265.

All Merchants Strangers in consideration of the Grant to them by the King of divers Liberties and Freedoms, *Concesserunt de quolibet dolio vini quod adducent vel adduci facerent infra Regnum, &c. solvent nobis & heredibus nostris nomine Custumæ duos solidos, &c.*

Rot Chartarum, Anno 31. E. 1. num 44. called Charta Mercatoria.

See the Charter at large in the Chapter of Customs.

It is called *Butlerage*, because the Kings chief Butler doth receive it. And the double value of these Duties is made penal, if any person customs Goods in another mans name whereby to defraud the King of *Prisage* and *Butlerage*.

Stat. 1 H. 5. 2 Ed. 6. 22.

IX. Breaking of Bulk is that which entitles the King to the Duty: for if a Merchant imports Wines to the number of 20 Tuns, yet if he unlades but part, as nine or four Tuns, yet the King shall have the entire *Prisage*; and though the Custom seems to declare, that the taking must be as well before as after the Mast, yet is not the Officer tyed to that strictness, but may take where he pleases; for two Tuns are the Kings due: for otherwise he might be cozened, the Freighter perhaps lading other Commodities aboard after the Mast.

Kenicot versus Hoggan, Telverton. Boyton's Case, 3 Rep. 44. 10.

If there be but one Tun taken out, yet the Duty must be paid: The reason is, for that otherwise the Officer should

should be obliged to travel perhaps all over the Kingdom.

Vouched in
the Case of
Customs in Sir
John Davies
Reports.

X. The King granted to a *Venetian Merchant* that he should be quit, *de omnibus Custumis, Subsidis, & Impositionibus, & omnibus aliis denariorum summis debitis & solubilibus pro quibuscunque Merchandizis importandis*; and that he should be as free as the Citizens of *London*. In that case it was adjudged in the *Exchequer*, That by that Grant the King did not discharge him of *Prifage*, because the *Prifage* was not specially expressed in the Grant, although that the City of *London* were by a special Charter freed of *Prifage*.

CL. I E. I. m. 5.

Bulstrode, 3. part,
fol. 1.

XI. The *Cinque-Ports* are likewise discharged of *Prifage*; yet if a Citizen of *Salisbury* should consign Wines to be delivered and unladed at *Dover*, the bare discharge of the Goods at that Port will not acquit the Importer from the Duty; for it is not the Parties Importation, but his Domicil that qualifies him for the benefit of his Immunity.

CHAP. IX.

Of Pilots, Wharfage, Primage, Averidge,
Loadmanage.

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| <p>I. Of the Pilots charge till the Ship is brought to her place or bed.</p> <p>II. If the Ship is likely to miscarry, what the Ships Crew may do at such time.</p> <p>III. Of ignorant Pilots their punishment, and if the Ship miscarries, who shall answer.</p> <p>IV. Of Wharfage, and where the</p> | <p>Wharfinger shall answer, and where not.</p> <p>V. Primage and Petilodmanage, where due, and for what; and if the Ropes break, whether the Master, or Wharfinger shall answer.</p> <p>VI. Petty Averidge where due, and for what, and Hat-money.</p> <p>VII. Loadmanage where due, and for what.</p> |
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I. **BY** the Laws of Oleron after that the Pilot hath brought the Ship to sure Harbour, he is no further bound or liable; for then the Master is to see her bed and to her lying, and bear all the rest of her Burthen, Charge, and Danger, except that of the act of God: So that before she comes to her place or bed, and while she is under the Pilot's charge, if she or her Goods perish, or be spoiled, the Pilot must make good the same.

II. By the Laws of Oleron, if his fault is notoriously gross, *Leg. Oleron*, that the Ships Crew sees an apparent Wreck, they may *cap. 23.* then lead him to the Hatches, and strike off his Head; but the Laws of England allow no such hasty execution.

By the Laws of Denmark an ignorant Pilot is to pass thrice under the Ships Keel.

The Master generally in the Charter-party covenants to find a Pilot, and the Merchant covenants to pay him his Pilotage.

III. But if a Ship should miscarry coming up the River, under the charge of the Pilot, it has been a Question, Whether the Master should answer in case of the insufficiency of the Pilot; or whether the Merchant may have his remedy against both? It hath been conceived the Merchant hath his election to charge either; and if the Master, then he must lick himself whole of the Pilot.

27 H. 8. cap. 26.

22 Car. 2. c. 11.

IV. *Wharfage* is money paid for landing Wines at a Wharfe, or for shipping or taking in Goods into a Boat or Barge, they commonly keep Boats or Lighters of their own for the carrying out and bringing in of Goods, in which if a loss or detriment happens, they may in some cases be made liable.

*Randall versus
Hilton & But-
ler, Pasch. 26.
Car in B. R.*

An Action of the Case grounded on the Custom of the Realm was brought against the Defendant Master of a Wharfe, for not safe delivering of Goods, &c. The Case appeared to be thus: The Master unladed a Bale of Silk into the Wharfingers Lighter, and sent part of his Mariners to convey it ashore; it happened that the Goods were stole: The Question was, Whether the Wharfinger or the Master should answer? Upon a Trial at *Guild-Hall* before my Lord Chief Justice *Hales*, it was there Rul'd, That the Master was liable, and not the Wharfinger; for till they are landed, the Master hath them under his power: but if Goods are to be sent aboard, there if they miscarry in their passage, the Wharfinger must answer.

32 H. 8. c. 14.

*Leg. Oleron,
cap. 10.*

V. *Primage* and *Petiledmanage* is likewise due to the Master and Mariners for the use of his Cables and Ropes to discharge the Goods, and to the Mariners for loading and unloading of the Ship or Vessel, it is commonly about twelve pence *per Tun*.

If the Ropes break in hoisting of Goods out of the Ship into the Lighter or Boat, the Master must answer if the Goods be damnified or lost.

*Col. Entries,
fol. 2.*

But if the Ropes break at the Crane in taking them out of the Lighter, (although till they are landed, they are not out of the Masters custody) yet the Wharfinger shall answer.

Some conceive that the Averidge mentioned in the Bills, is that which is the Averidge or Contribution for losses.

VI. *Petty Averidge* is another little small Duty which Merchants pay to the Master when they only take Tunnage over and above the Freight, the which is a small recompence or gratuity for the Masters care over the Lading; and in the Bills of Lading they are exprest after Freight, together with *Primage* and *Averidge* accustommed.

The French Ships commonly term the Gratuity *Hat-money*, and our English Merchants pay it our Masters over the Freight, it is sometimes more, sometimes less; two or three Pieces.

VII. *Loads-*

VII. *Loadsmen*, is he that undertakes to bring a Ship safe through the Haven to the Key or place of discharge, and if through his ignorance, negligence or other fault he suffereth the Ship or Merchandize to perish, an Action lyes against him at the *Common Law*; and so by some conceived he may be punished in the Admiralty, but not in both.

Rought on. Artic. Enquiry, fol. 27, 28.

The Hire is called *Loadmanage*, the which the Pilot receives of the Master for conducting the Ship up the River, or into the Port to her convenient bed.

If two Ships lye in an Harbour, and the Anchor of one is feared may occasion damage to the other, if after request and refusal (and there be probable cause) the other may take up the Anchor, and let the same down at a further distance, and the same, if opposed or hindred, and any damage happens, they are to make full satisfaction; so it is if they lay out an Anchor, and neglect the placing of a *Buoy* to the Anchor, and damage happen thereby, they are not only subject to be punished in the Admiralty, but likewise to render satisfaction to the party damnified.

Per Leg. Ole-ron. cap. 15.

If two Ships be in the River, and the one falls foul on the other both being laden, by the Law Marine the Contribution is to be in Common, and to be equally divided and appraised half by half; but then the *Mariners* must swear there was no fault in them: for otherwise one that hath an old rotten Vessel which he can no ways dispose of, may so order the matter as to lay her in the way of a good Ship under sail, so that the same may be answered in damage: but when the Contribution is made equal, then the contrivance will be avoided; but at the *Common Law* there can be no such Judgment, for one of them must be found guilty; and if so, he must answer the others damage, and for his own he may sit down by the loss.

Per Leg. Ole-ron. cap. 14.

C H A P. X.

Of Bills of Exchange.

- I. *Of the Antiquity of Exchange by the Hebrew Law.*
- II. *Of the Antiquity of Exchange by the Romans.*
- III. *Of Exchanges by other Nations in imitation of those people.*
- IV. *Of the several sorts of Exchanges, and of Cambio commune.*
- V. *Of Cambio real, or Exchanges value for value.*
- VI. *Of Cambio sicco, or dry Exchanges.*
- VII. *Of Cambio fictitio, or feigned Exchange.*
- VIII. *Of the Exchanges used this day, and on what.*
- IX. *How Exchanges are made, and upon Monies in London.*
- X. *Monies paid generally, how repaid by Exchange.*
- XI. *Of Bills of Exchange payable at single usance.*
- XII. *Bills of Exchange at double or treble usance, and of the customary usances to certain places from London and Amsterdam to other places.*
- XIII. *Of the nature of Bills of Exchange, and how esteemed of by the Laws of England.*
- XIV. *Bills drawn more than one, no prejudice to the parties; and of the true measure of judging on Bills by Custom.*
- XV. *What amounts to an acceptance generally, and on refusal where to be protested.*
- XVI. *All the Drawers are made liable; and whether the party to whom the Money is made payable, is bound to procure an acceptance,*
- XVII. *Protest, what is meant by the same; and where the same is necessary, and where not.*
- XVIII. *Bill drawn on two persons, where the same is necessary, and where not.*
- XIX. *One Factor serves a Company, where a Bill accepted of his by one of the Company, obliges the rest, and where not.*
- XX. *What words amount to an acceptance, and what not.*
- XXI. *Where a Bill may be accepted for part, and what must be done with the Bill thereupon.*
- XXII. *When a Countermand may legally be made, and when not.*
- XXIII. *How the several parties interested in a Bill of Exchange are obliged and fettered to each other.*
- XXIV. *How a collateral security may be annexed to a Bill when the time is elapsed for non-payment.*
- XXV. *Where the Protest is only necessary to be kept, and where that and the Bill must both be remitted.*
- XXVI. *Bill lost, what is necessary for the parties interested in such case to do.*
- XXVII. *Of blank Endorsements, the validity of the same.*
- XXVIII. *A Bill once accepted, whether the same may be revoked; and whether it may be accepted to be paid at a longer time than is mentioned: and what Protests are then necessary to be made.*
- XXIX. *Of Bills accepted for the honour of the Drawer, where the same shall oblige.*
- XXX. *The*

XXX. The time customary allowed for payment after failure of payment at the day.

XXXI. Of the validity of speedy Protests in relation to recover the money to be paid on the Drawer.

XXXII. Bill accepted, and before the day of payment the Acceptor is a failing, what's necessary to be done in reference to the obtaining better security.

XXXIII. Bills accepted for the honour of the Drawer, where turned into an act, and remitted by him that gives honour to the Bill.

XXXIV. The Acceptor ready to pay,

but the party to whom made payable is dead, what is necessary.

XXXV. Causes general for a Protest, and where satisfaction to the deliverer discharges all parties.

XXXVI. Of Exchange by way of Credit.

XXXVII. One pays a Bill before it be due, and the party to whom the same was paid, fails, where he shall be answerable to the Drawer notwithstanding.

XXXVIII. Of Bills assignable over according to the Customs of Merchants, what operation in England.

I. THE Exchange for Monies is of great Antiquity as well by observation of the Hebrew Customs, as those of the Romans.

Upon the first of the month *Adar*, Proclamation was made throughout all *Israel*, That the people should provide their half *Sheckles*, which were yearly paid towards the Service of the Temple according to the Commandment of God; on the 25th of *Adar* then they brought Tables into the Temple, (that is, into the outward Court where the people stood) on these Tables lay the lesser Coyns which were to furnish those who wanted half *Sheckles* for their Offerings, or that wanted lesser pieces of money in their payment for *Oxen*, *Sheep*, *Doves*, and the like, which stood there in a readiness in the same Court to be sold for *Sacrifices*; but this supply and furnishing the people from those Tables was not without an *Exchange* for other money, or other things in lieu of money, and that upon advantage: Hence all those that sat at the Tables were called chief *Bankers*, or *Masters of the Exchange*.

II. By the Romans it is supposed to be in use upwards of 2000 years, monies being then elected out of the best of Metals to avoid the tedious carriage of Merchandize from one Country to another: So other Nations imitating the Jews and Romans, erected Mints, and coyned monies, upon which the Exchange by Bills was devised, not only to avoid the danger and adventure, but also its troublesome and tedious carriage.

III. Thus Kingdoms and Countries having by their Sovereign

Exod. 30. 31.

Moses Kotsenses
printed at Venice,
An 1557.
de Siclis, fol.
122. Col. 2.

Alex. Gen. dier.
lib. 5. cap. 30.

veraign Authorities coyned Monies, caused them to appoint a certain Exchange for permutation of the various Coyns of severall Countries, without any transportation of the Coyn, but giving *par pro pari*, or *value for value*, with a certain allowance to be made those *Exchangers* for accommodating the Merchants.

IV. As Commerce became various, so Exchange numerous; but generally reduced to four, *Cambio commune*, *Cambio real*, *Cambio siccè*, and *Cambio fictitio*.

Reg. Orig. 194.
Statut. 5 R. 2.
cap. 2.
3 H. 7. 6.

Cambio commune, in England was those that were constituted by the severall Kings, who having received Monies in England, would remit by Exchange the like sum to be paid in another Kingdom. Edward the Third, to ascertain the Exchange, caused Tables to be set up in most of the general Marts or Ports of England, declaring the values of all or most of the foreign Coyns of those Countries where his Subjects held Correspondence or Commerce, and what allowances were to be made for having monies to be remitted to such Countries or Kingdoms.

18 E. 3.
Alton Burnel.

V. *Cambio real*, was when Monies were paid to the Exchanger, and Bills were drawn, without naming the species, but according to the value of the severall Coyns, which two Offices afterwards were incorporated, and indeed was no more but upon payment of Monies here in England to be repaid the just value in Money in another Country, according to the price agreed upon between the Officer and Deliverer to allow or pay for the Exchange of the Money, and the loss of time.

This usury
was first in-
troduced by
the Jews here
in England.
Vid. Co. 2. Inst.
fol. 506.

VI. *Cambio siccè*, or dry Exchange, is when a Merchant hath occasion for 500*l.* for a certain time, and would willingly pay Interest for the same; the Banker being desirous to take more than the Statute gives, and yet would avoid the same, offers the 500*l.* by Exchange for *Cales*, whereunto the Merchant agrees; but the Merchant having no Correspondence there, the Banker desires him to draw his Bill, to be paid at double or treble usance, at *Cales*, by Robin Hood, or John-a-Noakes (any feigned person) at the price of Exchange then currant; accordingly the Merchant makes the Bill, and then the Banker pays the Monies; which Bill the Banker remits to some Friend of his to get a Protest from *Cales* for non-acceptance, with the Exchange of the Money from *Cales* to London, all

all which with Costs, the Merchant is to repay to the Banker; sometimes they are so consciencious as not to make above 30 per Cent.

VII. *Cambio fictitio*, when a Merchant hath occasion for Goods to Freight out his Ship, but cannot well spare Money; the Owner of the Goods tells him he must have ready Money; the Buyer knowing his drift, it is agreed, That the Seller shall take up the Monies by exchange for *Venice*, or any other parts; but then the Merchant must pay for exchange, and re-exchange.

So likewise where the Merchant is become indebted to the Banker, they are contented to stay, the Merchant paying exchange and re-exchange; the which he will most certainly compel him to do.

These two last ways of grinding the face of the generous Merchant was afterwards prohibited, but notwithstanding it was found impossible to moderate the inequality of Exchanges, and to have value for value: so that at this day it seems to be a Cold that many an honest man is apt to catch.

VIII. The just and true Exchange for Monies that is at this day used in *England* (by Bills) is *par pro pari*, according to value for value; so as the *English* Exchange being grounded on the weight and fineness of our own Monies, and the weight and fineness of the Monies of each other Country, according to their several Standards proportionable in their valuation, which being truly and justly made, ascertains and reduces the price of Exchange to a sum certain for the Exchange of Monies to any Nation or Country whatsoever: As for instance,

If one receives 100 *l.* in *London* to pay 100 *l.* in *Exeter*; this by the *par*.

But if a Merchant receives 100 *l.* in *London* to pay 100 *l.* at *Paris*, there the party is to examine and compare the *English* weight with the weight of *France*, the fineness of the *English* Sterling Standard with the fineness of the *French* Standard; if that at *Paris* and that at *London* differ not in proportion, then the exchange may run at one price, taking the denomination according to the valuation of the Monies of each Country; but if they differ, the price accordingly rises or falls: and the same is easily known by knowing and examining the real fineness of a *French* 5 *s.*

Piece.

Piece, and an *English* 5 s. Piece, and the difference which is to be allowed for the want of fineness or weight, which is the exchange, and so proportionably for any summs of monies of any other Country, the which is called *Par*, or giving value for value.

† And therefore some are of opinion, that there can be no certain rate set on the *Par* in Exchange, to answer justly the value of the Coyns of Foreign parts, by reason of the diversity of them, and of their intrinsick values. *Vide Sir Robert Cottons Posthuma, fol. 306.*

IX. As money is the common measure of things between man and man within the Realm, so is exchange between Merchant and Merchant within and without the Realm; the which is properly made by Bills when money is delivered simply here in *England*, and Bills received for the repayment of the same in some other Country, either within the Realm or without the Realm, at a price certain, and agreed upon between the Merchant and the Deliverer. For there is not at this day any peculiar or proper money to be found in *specie* whereupon Out-land Exchanges can be grounded; therefore all Foreign Coyns are called imaginary.

*Cro. 2. fol. 7.
Martin versus
Bour. Pasch.
1 Jac. in B.R.*

At *London* all Exchanges are made upon the pound sterling of 20 s. and 12 d. to the shilling, for *Germany*, *Low-Countries*, and other places of Traffick; and for *France* upon the *French Crown*: for *Italy*, *Spain*, and some other places, upon the *Ducat*: For *Florence*, *Venice*, and other places in the *Streights*, commonly by the *Dollar* and *Florin*.

X. Bills drawn to be paid, are either at sight, or a time certain, single, double or treble usance, and are commonly about three, for fear of any miscarriage.

The taking and delivering money at sight binds the taker up to give his Bill to pay at sight, or within some short time the like sum after such a rate the Pound, Dollar, Ducat or Crown, as is agreed between them in Foreign Coyn, either according to the valuation of monies, or currant monies for Merchandize.

XI. The second time of payment is called *Usance*, it is known

known or taken to be the compass of one month, to be computed from the date of the Bill, and that governed according to the custom of the place where those Exchanges do run.

XII. The third is double or treble *Ufance* two or three months; sometimes there are Exchanges made upon half *Ufance*.

The times of payment do alter the price of Exchanges according to time, commonly after 12, 15, or 20 in the Hundred by the year.

Ufance from London to	[Middleborongh	} are generally account- ed one months time from the date of the Bill.
	[Amsterdam	
	[Antwerp	
	[Bridges	
	[Rotterdam	
	[Lisle	
	[Paris	

Ufance from Amsterdam to	[Rome	} are generally account- ed two months from the date, &c.
	[Genoa	
	[Venice	
	[Naples	
	[Palermo	
	[Luca	
	[Sevill	
[Lisbon		

From London to	[Florence	} is sometimes account- ed treble Ufance from the date of the Bill.
	[Venice	
	[Leighborn	
	[Zant	
	[Aleppo	
[Luca		

The Bills may have a larger, sometimes a shorter time, there is no direct certainty, but only that single *Ufance* is a month, double *Ufance* two months, &c.

XIII. *Excambium vel Cambium*, or as the Civilians term it, *Permutatio*; *Billa Excambii* signifies no more but a customary Bill, solemnized by numerous consent of Traders, to have a respect more than other Bills, though of as high and as intrinsecal a value: And those that give such Bills are called *Exchangers* or *Bankers*.

Though

Reg. Orig. fol.
194.
Statut. 5 R.2.
cap. 2.

Though the Act was no more but to keep up the life of Commerce, (without which it is impossible for any Nation to flourish) yet could not any person draw such Bills, or return Money beyond Seas, without Licence first obtained of the King. But at this day any man may do it without being obliged to obtain such leave.

XIV. Such a Bill being drawn, they commonly take one or two more of the same date word for word, only this Clause is inserted in the second, *My first of the same date, persons and summs not being paid:* And in the third, *My first and second of the same date, and contents not being paid.*

Consuetudo
quandocumque pro
lege servatur, pro
fatis Bracton,
in partibus ubi
fuerit more u-
rentium appro-
bata; longevi
enim temporis
usus et consue-
tudinis non est
viliis auctoritas,
lib. 1. cap. 3.

The right measure of judging on Bills of Exchange, is purely by the laudable Custom often reiterated over and over, by which means the same hath obtained the force of a Law, and not the bare and single opinion of some half-fledg'd Merchants: For Bills of Exchange are things of great moment as to Commerce, and are neither to be restrained so high, as that a man should not cast his eye on them, but the same shall be taken to be an *acceptance*: nor on the other hand, having duly accepted them, the same should be rashly and unadvisedly avoided, by the shallow fancy of such nimble pated shufflers; but they are soberly judged and governed, as the same hath generally been approved of, and adjudged of in former Ages.

XV. A Bill being remitted, the party is to go immediately to the person to whom the same is directed, and present the same in order to his acceptance; if it be tendered, and the party subscribes *Accepted*; or *Accepted by me A. B.* or being in the *Exchange* says, *I accept the Bill, and will pay it according to the Contents*; this amounts without all Controversie to an Acceptance.

Words are
made to signi-
fic things; by
the word De-
liverer is

But if the same be refused, the party must then procure a *Protest*, and remit the same to the *Deliverer*, who is to resort to the *Drawer* for satisfaction for the principal costs and damage.

meant he that pays the money beyond Sea. By the word *Drawer*, he that writes or draws the Bill of Exchange; the person upon whom, is called the *Acceptor*.

XVI. If there be several *Drawers* who subscribe, all are liable in case of a *Protest*.

If a Bill is drawn upon a Merchant in *London* payable

to J. S. at double Usance, J. S. is not bound in strictness of Law to procure an acceptance, but only tender the Bill when the Money is due: but Merchants who generally have generous spirits, will not surprize a man, but will first procure an acceptance, or at least leave the Bill for the party to consider and give his answer, and then give advice of the same, and if the Money be not paid, then protest.

XVII. A Protest is no more but to subject the *Drawer* to answer in case of non-acceptance, or non-payment; nor does the same discharge the Party Acceptor, if once accepted; for the Deliverer hath now two remedies, one against the *Drawer*, and the other against the *Acceptor*.

To entitle the Party to an Action at Law in *England* against the Acceptor, it matters not whether there be a Protest; but to entitle the Party to a recovery against the *Drawer* beyond the Seas or elsewhere, there must be a Protest before a Publick Notary.

XVIII. A Bill drawn on two jointly must have a joint acceptance, otherwise it must be protested; but to two or either of them, *è contra*.

Per Jasonem in lege allegatur ff. de conditionib. indebiti.

Then if the same be accepted by one, it is pursuant to the tenour of the Bill, and ought not to be protested but in case of non-payment; and in that case the person acceptor is liable to an Action, but if it be on joint Traders, an acceptance by one will conclude and bind the other.

XIX. A Factor of the *Hamborough, Turkey, or India*, Company draws a Bill on the same, and a member accepts the same, this perhaps may make him liable, but not another member.

So it is if ten Merchants shall employ a Factor at the *Canaries*, and the Factor draws a Bill on them all, and one of them accepts the Bill, and then refuses payment; this will not oblige the rest.

But if there be three joint-Traders for the common stock and benefit of all three, and their Factor draws a Bill on them, the acceptance of the one will oblige the residue of the Company.

Mich. 19 Jac. C. B. Vanhiath versus Turner, Winch. 24, 25.

XX. A small matter amounts to an acceptance, so that there be right understanding between both Parties: As, *Leave your Bill with me, and I will accept it; Or, Call for it*

to morrow, and it shall be accepted; that does oblige as effectually by the Custom of Merchants, and according to Law, as if the party had actually subscribed or signed it, (which is usually done.)

But if a man shall say, *Leave your Bill with me, I will look over my Accounts and Books between the drawer and I, and call to morrow, and accordingly the Bill shall be accepted;* this shall not amount to a compleat acceptance: for this mention of his Book and Accounts was really intended to see if there were effects in his hands to answer, without which perhaps he would not accept of the same. And so it was Rul'd by Lord Chief Justice *Hales* at *Guild-Hall*.

The receiving of part of the Monies upon the Bill, does no ways weaken the Bill.

A Bill may be accepted for part, for that the party upon whom the same was drawn, had no more effects in his hands; which being usually done, there must be a Protest, if not for the whole sum, yet at least for the residue: however, after payment of such part there must be a Protest for the remainder.

Per leg. publica in si ff. depositi & per Bart. ibidem, & per Romanum singularem, fol. 474.

XXII. Any time before the money becomes due, the Drawer may countermand the payment, although the Bill hath been accepted.

The Countermand is usually made before a Notary; but if it comes without, so it comes under the parties hand, it is well enough.

If the Bill be accepted, and the party desires to have the money before it be due, and it is paid, and then there comes a countermand; it hath been conceived that he ought not to be allowed; for as he could not enlarge the time, so he could not shorten it, but his duty is to follow his Order.

XXIII. Note, The Drawer is bound to the Deliverer, and the Acceptor to the party to whom the bill is made payable; yet both are not bound to one man, unless the Deliverer be a servant to the party to whom the money is made payable; or the party to whom the money is made payable be servant to the Deliverer: yet both Taker and Acceptor are liable till the bill is paid.

XXIV. Therefore when you bring your Action, be sure to draw your Declaration accordingly, and make the same part of the Custom as you set it forth; for if you vary,

vary, you must expect to be nonsuited : and the party is not bound to alledge a particular place of demand.

If a Bill be returned, protested for want of payment, the Drawer is to repay the money and damage, or else he may procure a security, which is no more but another person of value subscribes the bill, in these and the like words, *I here underwritten do bind my self as Principal, according to the custom of Merchants, for the summ mentioned in the Bill of Exchange whereupon this Protest is made, Dated, &c.*

*Styles, Pasch.
Anno 1654. in
B.R. fol. 370.*

Now the Drawer, by virtue of this supplemental agreement, hath as much time again to pay the monies as there was given him in the bill when it was first drawn ; so that if the money be not then paid, together with the Rechange and Charges of the party, the party may recover the same on the Principal or Security.

XXV. Beyond the Seas the Protest * under the Notary's hand is sufficient in shew in Court without producing the very bill it self. But if a bill in *England* be accepted, and a special Action grounded on the Custom be brought against the Acceptor, at the Tryal the party Plaintiff must produce the bill accepted, and not the Protest ; otherwise he will fail in his Action at that time.

* That is for not payment the Bill being once accepted.

Therefore it is safe that a Bill once accepted be kept, and only a Protest for non-payment be remitted ; but a bill protested for not acceptance must be remitted.

XXVI. If a Bill is left with a Merchant to accept, and he loses the bill, (or at least it is so mislaid, that it cannot be found) the party shall request the Merchant to give him a Note for the payment according to the time limited in the Bill of Exchange ; otherwise there must be two Protests, one for not acceptance, the other for non-payment ; but if a Note is given for payment, and there happens to be a failure, yet in that case there must be a Protest for non-payment.

XXVII. A Bill is remitted to *J. S.* who owes monies to *J. D.* : *J. S.* delivers the bill to *J. D.*, and on the back-side subscribes his name ; if *J. D.* receives the monies, he may fill up the blank as if the monies had been actually paid to *J. S.* : This is practised amongst Merchants, and by them reputed firm and good. But certainly the *Common Law* looks upon this filling up of blanks after a man hath once signed or sealed, to be no better than a harmless forgery ; but if there be either a general or special authority to the purpose, it may then alter the Law.

By the opinion of my Lord *Hales*, *Hill. 28. Car. B.R. at Guild-Hall.*

E i Note,

Note, No person, be it Wife or Servant, can accept of a Bill of Exchange to bind the Master without a lawful authority, as a Letter of Attorney and the like, which must be under-hand, unless that it has been formerly and usually done by the Wife or Servant in such case, when the Master hath been out of Town, who hath approved of the same and answered payment : it must be usually done ; but one Partner may for another.

Stiles Reports
in B.R. fol. 307.

Monck versus
Clayton Milit.
and Morris.
Mich. 22 Car. 2.
in B. R.

A Servant of Sir Robert Clayton and Mr. Alderman Morris, (but at that time actually gone from them) took up 200 Guineys of Mr. Monck a Goldsmith, without any authority of his Masters ; (but Monck did not know that he was gone) the monies not being paid, Monck brought an Action against Sir Robert Clayton and Morris, and at Guild-Hall it was Rul'd per Keeling Chief Justice, That they should answer ; and there was a Verdict for the Plaintiff. And though there were great endeavours to obtain a new Tryal, yet it was denied, the Court at Westminster being fully satisfied that they ought to answer : for this Servant had used often to receive and pay monies for them ; and thereupon they actually paid the monies.

And though
the same seems
an act of wisdom
for Merchants
and others so to

Note, That which will oblige the Master, will be the authority and liberty which he usually gives the Servant ; therefore such a power devolved, ought to be secured by the prudentest way that may be : which is generally done by Bonds and Obligations.

take, yet it oftentimes proves the destruction of many a Family ; the Father puts out the Son perhaps with no less than 2 or 300 £. and is himself become bound for his Truth and just Accounting, &c. The Servant is immediately trusted with his Cash, and then he too young experienced in the World, either neglects keeping a just account, or keeping that, subjects his Masters Cash to be spent by himself and those who make it their sole Trade to betray such Youths : The Master finding the consumption, calls his Servant to account, who conscious of the act, forsakes his Service, dares not see his Relations, and then as a general consequence falls into Company, the which nothing but Providence can preserve from taking their wicked courses. The Father is called to answer, whatever the Master does say the Servant hath spent or imbezled, none being able to contradict him, he must with a heart full of grief submit to and pay, besides the loss of the Monies advanced upon the Servant's first putting forth : Which sometimes proves a great affliction in a Family. On the other side, if Servants were not to be intrusted, the Mystery could not be learnt, nor the business dispatched ; and therefore faith must be given : but then it were justice and honesty that as a Father puts perhaps the Child of his love to one in whom he reposes a faith and trust, that the Master should be then as a Parent, so they should prevent all occasions that might subject them to temptations, and not be over hasty in trusting them with the Cash : which is the very Bait our London Gamesters catch such Gudgeons with.

If a Bill of Exchange by contrary Wind or other occasions be so long on the way, that the Usance or time limited by the bill be expired, and being tendred, both acceptance and refusal are denied; Protests for both must be made, and the Drawer must answer the value, rechange and damage.

XXVIII. A Bill once accepted, cannot be revoked by the party that accepted it, though immediately after and before the bill becomes due, he hath advice the Drawer is broke.

If a Bill is not accepted to be paid at the exact time, it must be protested; but if accepted for a longer time, the party to whom the bill is made payable, must protest the same for want of acceptance according to the tenour; yet he may take the acceptance offered notwithstanding. Nor can the party if he once subscribes the bill for a longer time, revoke the same, or blot out his name, although it is not according to the tenour of the bill; for by his acceptance he hath made himself debtor, and owns the draught made by his Friend upon him, whose right another man cannot give away, and therefore cannot refuse or discharge the acceptance.

Note, This case will admit of two Protests, perhaps three:

1. One Protest must be made for not accepting according to the time.
2. For that the Money, being demanded according to the time mentioned in the bill, was not paid.
3. If the Money is not paid according to that time that the Acceptor subscribed or accepted.

Bald. in leg. prod. debit. C. de bon. actor. Jud. possiden. Et per Bartol. in leg. singul. Col. 7. ff. probatur.

A Bill was drawn payable the first of *January*, the person upon whom the Bill was drawn accepts the Bill to be paid the first of *March*, the Servant brings back the Bill: The Master perceiving this enlarged acceptance, strikes out the first of *March*, and puts in the first of *January*, and then sends the Bill to be paid, the Acceptor then refuses; whereupon the person to whom the monies were to be paid, strikes out the first of *January*, and puts in the first of *March* again, in an Action brought on this Bill, the question was, Whether these alterations did not destroy the Bill, and Rul'd it did not.

Per L. C. J. Pemberton in- ter Price & Shute, Pasch. 33. Car. 2. in B. R.

A. draws a Bill on *B.* and *B.* is in the Country; *C.* a Friend of his hearing of the bill accepts it: the party to whom the money is to be paid, must make a protest for non-acceptance by *B.* and then he may take the acceptance of *C.* and it shall bind *C.* to answer the money.

Pinchard vers.
Fowl, Styles,
fol. 416.

If a Bill is drawn on *B.* and *B.* happens to be in the Country, and a Friend of his desires the party not to protest, and he will pay the same, it is good, and shall bind such party.

Pasch. 1654. in
B. R. Styles,
fol. 370.

If there be two joint Merchants or Partners, and one of them accepts a Bill of Exchange, the same shall bind the other; and an Action of the Case on the Custom may be maintained against him.

London.

XXX. Merchants generally allow three days after a bill becomes due for the payment; and for non-payment within three days protest is made, but is not sent away till the next Post after the time of payment is expired.

Holland.

If *Saturday* is the third day, no protest is made till *Monday*.

There are two
Protests:

1. For non-acceptance which is called intimation.
 2. For non-payment.
- * Which is looked upon to be the third day.

XXXI. The use of the Protest is this, That it signifies to the Drawer that the party upon whom he drew his bill was unwilling, not to be found or insolvent, and to let him have a timely notice of the same, and to enable the party to recover against the Drawer; for if one draws a bill from *France* upon a person in *England*, who accepts and fails, or becomes insolvent at the time of payment, if there be not a Protest and * timely notice sent to the Drawer there, it will be difficult to recover the money.

There is no danger, be the party never so responsible, to protest immediately if the money be not paid when it is due, i. e. the third day, but there may (especially beyond Seas) be great hazard for want of protesting.

In *Holland* they are not altogether so strict, yet there must be a reasonable time of notice; the reason is, for perhaps if he had reasonable and timely notice, the Drawer then might have had effects or other means of his upon whom he drew, to reimburse himself the bill; which since for want of timely notice he hath remitted or lost. And the general Rule is, That though the Drawer is bound to the Deliverer till the bill is satisfied, yet it is with this Proviso, that protest be made in due time, and a lawful and an ingenious diligence used for the obtaining payment of the monies; for it were unreasonable the Drawer should suffer through his neglect.

XXXII. Where

XXXII. Where a Merchant hath accepted, and before the same became due, he becomes insolvent, or at least his credit publickly blasted, a protest ought to go ; but then there is usually a demand made, which once coming, the Drawer is compellable to give better security ; and if a second bill comes, if no protest, then Drawer and Security lie at stake.

In leg. pro debito in fine C. de bon. author. Jud. possiden.

XXXIII. If a Merchant draws a Bill, and there is a Protest for non-payment ; if another person hearing of the same, declare, that he for the honour of the Drawer will pay the contents, and thereupon subscribes, he is obliged thereby : and in this case it has been practised, that that party that received the money hath put his name on the back-side of the bill in blank ; but the receipt is sometimes taken on the protest, which together with the whole proceeding is turned into an Act, and the same being drawn by the Notary, is remitted to the Drawer by him who gave honour to the bill.

XXXIV. If a bill be accepted, and the party dies, yet there must be a demand made of his Executors or Administrators ; and in default or delay of payment, a protest must be made : and although it may fall out, that the monies may become due before there can be Administrators, or the Probate of the will be granted ; yet that is delay sufficient for a Protest in case of non-payment.

Fourteen days allowed from the death before Administration can be committed, unless there be a Will.

But on the other hand, if the party be dead to whom the monies are made payable, and the monies are ready to be paid, and there is no person that can legally give a discharge ; yet a protest ought not to go for non payment ; The reason is, because there is no person that hath any authority either in Deed or in Law to make it, and a Notary ought not to make it ; if he does, and the party hath received any prejudice thereby, an Action of the Case perhaps may lie against him for his pains : nor does it avail, that if security be offered to save him harmless against the Executors or Administrators, for that is an act left to his own discretion ; for perhaps the security may not be lik'd : but whether good or bad, makes nothing as to oblige him in Law.

But an intimation ought to go, and that the Acceptor is willing to pay according to Order.

But if a man is bound in a Bond to pay a sum of money to J. S. his Executors, Administrators, &c. and the Obligee dies intestate the day before the sum becomes due,

due, yet the Bond is not forfeited if not paid at the day, because there was no body to whom the Obligor could pay to save his Obligation : But as *Littleton* says, *If it be to pay to J. S. generally, you must hunt him out all over the Kingdom, if you'll save the penalty.*

XXXV. A man not found, or being found, not met withal either at home or the *Exchange*, is cause sufficient for a protest ; but in that there must be diligence used in the finding him.

A bill returned protested for non-payment being once satisfied by the drawer to the deliverer, the drawer is discharged, and so is the Acceptor to him to whom the monies were to be paid : but the Acceptor, by virtue of his acceptance, makes himself a debtor according to the *Custom of Merchants* to the Drawer.

XXXVI. Monies may be had on Exchange by way of Letters of Credit, the which are in two respects ; the first general; the other special.

The general Letter is open, directed, *To all Merchants and others that shall furnish my Servant or Factor, or any other with such and such Monies*; for repayment of which he binds himself to answer and pay all such Bills of Exchange as shall be drawn on him upon the receipt of the value, by his Servant, Factor, or other person : if there be really monies advanced on this Letter of Credit, and paid to the Factor, Servant or other, and Bills of Exchange are sent to the party that sent such Letter of Credit, and if he refuses to accept, yet according to the customs of Merchants he is bound to pay ; The reason is, for there was no respect had to the ability of the taker up, but to him that gave his Letters of Credit : and therefore in such case if an Action at Law be brought, the particular custom as to that point must be carefully set forth.

The special Letters of Credit, where one writes a Letter to furnish another mans Factor or Agent ; there is in this the same remedy as above.

As Bills of Exchange seldom come without Letters of Advice, so ought they to be pursued : If a bill shall express, *And put it to the Account of A* ; and the Letter of Advice says *B* ; this must be protested against, for it cannot safely be paid, at least running the risque of an equitable Suit.

XXXVII. If

XXXVII. If one pays money on a bill before it be due, and the party breaks, it has been conceived that the party ought to answer the drawer: The reason hath been, because the drawer might have countermanded the same, or ordered the bill to be made payable to another.

In *Italy* if money is paid to a Banker's Servant, and if the Master subscribe, *Pagare com si dice*, this binds the Master as effectually as if he had subscribed it with his own hands.

XXXVIII. A Bill drawn by a Merchant in *London* payable by another person beyond Seas, such bills in most Countries are assignable over from Merchant to Merchant, and the last person may sue and recover the same upon an acceptance: but in *England* only the first person mentioned in the bill, and to whom the money is made payable may recover. 'Tis true, such person to whom the money is made payable, may for valuable consideration deliver this bill to another person, and he may endorse an Order on the back-side; and if the party afterwards refuses payment of the same, it may be sued in the parties name to whom the same was transferred, laying the same by way of Custom.

C H A P. XI.

Of Monies advanced by way of Bottomery,
or *Fœnus Nauticum*.

- | | |
|--|---|
| <p>I. How Commerce is made equivalent to Natural Community.</p> <p>II. Whether Money be fit only to maintain the Trade and Credit of Vice.</p> <p>III. Whether Abraham chose to acquire a Property by Money.</p> <p>IV. Of the natural and instrumental measure of the value of things.</p> <p>V. How Money is equal to all things.</p> <p>VI. Money is for buying, and hinders not, but helps Permutation.</p> <p>VII. Money the instrument of Charity and Sacrifices as well as our Necessities.</p> <p>VIII. Of the difference between Monies advanced to be used in Commerce at Land, and that which is advanced at Sea.</p> <p>IX. Of Monies advanced by way of Bottomery when the Contract hath its inception.</p> | <p>X. Of Monies sent on Ship-board, and the Vessel is wreck'd, where the Lender shall bear share of the loss, and where not.</p> <p>XI. Of Monies taken up by the Master, where the same shall oblige the Owners, and where not.</p> <p>XII. The derivation and institution of this sort of Loan, and for what causes.</p> <p>XIII. Of the several ways of taking up of Monies by way of Bottomery, real and feigned.</p> <p>XIV. Monies so advanced, whether gain ought to be bounded, or otherwise left to the will of the Lender.</p> <p>XV. Of Usura Marina, how reasonable the same stands at this day.</p> <p>XVI. Of Monies advanced to a considerable profit called Usufruct, being both honest and honourable.</p> |
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I. **M**oney is one of those things which they who want, want all other things but words to reproach their bad Fortune. But sometimes it is the policy even of Rags and Poverty it self to undervalue that which it cannot have, and to convert that which it hath (though never so mean) into an esteem; and then to lodge as much pride in a Tub, as *Alexander* could in a Palace, though it could not tempt him to a change of condition.

*Nil habet infelix paupertas durius in se,
Quàm quod ridiculos homines facit—*

No wonder therefore, seeing Rich men will be obstinate to hold their advantages, that deformed Poverty (which mixes with them in the same frame as a shadow to set off their

their colours the better) would have the Rich to descend to them ; and that instead of setting out Monies by way of *Bottomery*, *Usury*, and the like, they would not have any such thing as Money at all, but would have all things reduced into a state, as is before mentioned *.

* *Lib. 1. cap. 1.*

It cannot be denied, but that we all live by the natural or intrinsic value of things ; but the way to come by them is by an Instrument of civil value, which is Money ; instead of Community therefore we now have Commerce : which *Commercium* is nothing else but *Communio mercium* ; but Communio must needs be by the means of another thing that may bear equal proportion on both sides, which is Money only. But now let us hear, and if possible, satisfy the Complaints that are made against it so impatiently.

§. 1, 2, 3.

Where there is great Luxury, there must be likewise great Industry to maintain it ; and therefore the Industry of this Civil State must be greater than that which is in the simple State of Nature : but what is there here to blame, seeing Industry, no more than plenty, is in it self a Sin ?

Ascham de Nat. Monet. cap. 6.

II. It is the Answer of Envy or Ignorance, *Prima peregrinos obscœna pecunia mores—intulit*—Money is that (say they) which maintains the Trade and Credit of Vice, if that were taken away, we should look after nothing but necessaries which are vertuous ; it makes too nice inequalities and distances, and is not significant enough in the best things : for all the Money in the World is not really worth one penny Loaf, which is convertible into our Natures and Substances ; it serves only to assure Fortune, but not Vertue, it is accepted as the measure of all things Natural, Moral, and Divine : for Honour is nothing but ancient Riches †, and in Morals, *Virtus post nummos* ; this in Religion breeds that root of all Evil, Covetousness : for in a simple state of Nature necessary things must needs be spent within a short time, and the return of the Sun brings a new Supply and a Treasure greater than the *Indies* ; of which One * makes this Observation, *That it was got in Blood, sails home in a Sea of Blood, and never rests till it be laid out in Blood.* This was that which was made the price of *Salvation*, even of the Blood of our Blessed Saviour, thirty Pieces for that which was worth Thirty thousand

† *Arist. Polit.*

* *Campanella Monarch. Hisp.*

thousand Worlds; but in the Religion of the first Times, *Nulla violatus Jupiter auro*, as *Juvenal* hath it.

And if this had not been brought into the World, we should not have so much to discount for at the day of Judgment. Why therefore should that which is condemned to the obscurity of the Earth, and lodged so near Hell, now be made the price of all that which is above the Earth, even *à Solo usque ad Cælum*? Or why should we be excluded from the Gifts of Nature, unless we have those of Fortune? Is it not then more reasonable that rich men lose this Instrument of Luxury, than the Poor should lose the necessary means of their subsistence? This is the Plea which is made *in forma Pauperis, & de ipsa Paupertate*.

Most certain it is, that neither the stupid simplicity of the Woods, nor Poverty it self are any part of Vertue; and therefore are not reckoned Blessings, as Riches were to *Solomon*, (he who built God's first Temple, and put his Religion in lustre) and as they likewise were to *Numa*, from whom Money was called *Nummus*: He likewise built the first Temple at *Rome*, and kindled first the Vestal fire, *& ferocem populum deorum metu mitigavit*.

III. We know how God conversed with *Abraham*, who was the first that had Money, and made use of it to buy a Property: It is true, they with whom he inhabited called him a Prince; but that was no argument to him to disown their Properties, but for the contrary, lest they should think that Dominion or a Right to things was founded in Grace.

IV. But to come more close to the Question, and to examine thereason and necessity of this measure, Money is like a Law or Government, which are all constituted by the same extreme necessity; therefore the counterfeiting or attempting to destroy any of these by private means, is every where Treason. Now this measure is two-fold, either Natural or Civil, or rather Natural, and the Instrument which expresses the natural by equal Permutation: The natural measure is proportioned either by *Want*, or *Plenty*. In *Want* we consider whether the thing be useful or necessary; things which are necessary are best, but of least price; as a Loaf of Bread is more necessary, but infinitely cheaper than a Diamond. One man hath Cloths, another man hath Leather; those two possibly have no
need

need one of another, and therefore there will be no Permutation betwixt them; but if one had need of another, then he who were most prest, would come to the price of the other: And therefore *Want* or *Plenty* is the measure of estimating things, and is the bond of Society, whereby one man shews he is or may be useful to another; and Nature hath so order'd it, that no man is so Rich who hath not some need of the Poor; and no man is so mean and abject, but he may be some ways useful to the Rich.

V. The Civil measure, or rather Instrument, whereby the Natural expresses it self, is *Money*, which hath but a feigned value, and therefore it is sometimes higher and lower in esteem as men please; which could not be, if its value were natural which is unalterable. If I have Cloth at such a price, and you have Wines at the same price, then we regarding the same price, may make an equal Permutation: Or if I give to you so many pieces of Gold for your Cloth at the same price, the sale is equal again, whether it be an inconvenience that in some Countries* it is sometimes at a higher value than at another, is not a consideration of this Discourse; for the price of things themselves change more than any money doth daily.

Money is like the middle term of a Syllogism, of which it is said, *Que conveniunt in termino conveniunt inter se.*

* Poland, and generally in most of those Northern Countries.

VI. *Money* is an invention only for the more expedite permutation of things; but it doth not follow that men may not make any permutations but by Money, even as well now as if we were in our natural state; if they who dig now in waste Hills have their Harvest of Beans well gathered in, but had need of Wine for the Stomachs sake, or of Drugs for Healths sake; if the Vintner, or Apothecary have no need of Beans, what use will they make of the natural value of their Beans without Money? Or it need be, what would they do till their Beans are gathered? Money therefore hinders not Permutation and Commerce of natural things, but assists them; nay it is therefore an Instrument of Instruments; for he who hath Money may buy things which he need not use but sell, thereby to get other things afterwards for his use. There is no Nation or People so barbarous, but have Money or a publick Instrument of Permutation either in Metals or Fish bones, &c. for it imports not much of what matter it is, provided it be durable, not counterfeitable, and difficult to come by.

VII. Take

Vide Chap. of
Exchange,
S. I.

VII. Take way this fungible Instrument from the service of our necessities, and how shall we exercise our Charity, which is a branch of Religion and Justice, as well as of Humanity? He who goes to Church passeth as it were through two Temples, the Poor at the Porch, and the Temple it self: and the giving at the Porch is called Sacrifice, Offering, and Gift, as well as that at the Altar. God would be sacrificed to only in one Town of the World, *Jerusalem*: but could that have been, if *Money* and *Money-changers* had not been allowed? How could they who came from such remote places have by any other means brought their Oxen, Calves, Goats and Doves to the Altar? If there were nothing further to shew, but that one piece which our Saviour himself coyned miraculously in the mouth of a Fish, it were Argument sufficient that the use of *Money* may be both good, just, and necessary.

VIII. Things being thus stated, and that *Money* is both good, just, and necessary, it will be demanded loudly, That admitting a reasonable advantage may be made by way of Usury, *quo jure* is it that an advantage upon the same more than what the Law allows, is taken?

Leg. 3. D. de
Naut. fœn.
lib. 1. cod. 1. 62.
D. de rei Vin-
dic.
Locinius, lib 2.
cap. 4. §. 2.

The distinction is great between monies lent to be used in Commerce at Land, and that which is advanced to Sea. In the first, the Laws of the Realm have set marks to govern the same, whereby the avaritious mind is limited to a reasonable profit: The reason of that is, because the Lender runs none, but the Borrower all the hazard whatever that *Money* brings forth. But *Money* lent to Sea, or that which is called *Pecunia* * *trajectitia*, there the same is advanced on the hazard of the Lender, to carry (as is supposed) over Sea; so that if the Ship perishes, or a spoliation of all happens, the Lender shares in the Loss without any hopes of ever receiving his *Monies*; and therefore is called sometimes *Usura Marina*, as well as *Fœnus Nauticum*, the advantage accruing to the Owners from their Money, arising not from the Loan, but from the hazard which the Lender runs; the which is commonly reduced to a time certain, or one or more Voyages, according to their several and respective agreements.

IX. If the Bonds be sealed, and the *Money* is advanced, if the Ship happens to miscarry by Storm, Fire, Enemy, or any

* Leg. Fœn.
Naut. Leg.
periculi eod.

any otherwise before the Voyage begun, then the Borrower runs the risque, unless it be otherwise provided generally, as that if such a Ship shall not arrive at such a place at such a time, &c. there the Contract hath its inception from the sealing; but if the Condition be, That if such a Ship shall sail from *London* to *Amsterdam*, and shall not arrive there, &c. then, &c. there the contingency begins not till the departure. Yet it has been conceived, That if the Master takes up Money accordingly and buys in a lawful Lading, but will happen to endeavour to defraud the Prince or State of their Customs, and puts such Goods on board, by means whereof he has incurred a Forfeiture of his Ship; in such case the Lender is not obliged to such hazard.

Vide passim ad leg. de Fan. Naut. & DD. leg. Naval. Rhod.

Vide leg. 3. C. de Fan. Naut.

X. If Money be lent on Ship-board by a Merchant *super Cargo* or Passenger, and before the day of payment the Ship happens to be wreckt or cast away; if there be such a Saver as will admit a Contribution, then the party is not to have his whole Money, but is to come into the AVERAGE: but if the time of payment were past before the misfortune happened, then the Lender must be repaid his whole Money free from Contribution.

Leg. Naval. Artic. 17.

And therefore by the Laws Marine, if the Borrower detains any such lent Monies beyond the term appointed for the repaying, he shall at his return not only pay the profit agreed on before the Voyage, but also augment the same according to the time that hath accrued since the day of payment.

Artic. 18.

XI. A Master of a Ship hath no power to take up Money by *Bottomery*, in places where his Owner or Owners dwell, unless it were for so much only as his part comes to in the said Ship: otherwise he * and his Estate must stand liable to answer the same. But when a Master is out of the Country, and where he hath no Owners, nor any Goods of theirs nor of his own, and cannot find means to take up by Exchange or otherwise, and that for want of Money the Voyage might be retarded or overthrown, Monies may be taken up upon *Bottomery*, and all the Owners are liable thereunto; otherwise he shall bear the loss, that is, the Owners are liable by their Vessel, though the Money is not so employed in truth; and the Owners have their remedy against him whom they put in trust: but the persons of the Owners

* *Testatur Vinus in Peckium ad LL. Nautic. quem vide pag. 95.*

Leg. Oleron, c. 1. Leg. 4. D. de Naut. fzn. l. 1. C. eod. Leg. qui Roma §. Callimachus de verb. obl. & ibi Gothfr. & alios.

Owners are no ways made liable by the act of the Master for Monies taken up.

Scarborough
and Lyrist,
Pasch. 3 Car.
in B. R. Rot.
fol. No. 95.

If Owners agree not in setting out the Ship, most voices shall carry it, and then Money may be taken up for their part by Bottomery, or *Fennus Nauticum*, or by Hypothecating such a proportion of the Ship.

16 Car. cap. 6.
A good Law,
and ought to
be encoura-
ged; it's pity
it was not con-
tinued.

Many Masters of Ships having Ensured or taken up Monies upon Bottomery to greater Sums of Money than the value of their Adventure, do wilfully cast away, burn, or otherwise destroy the Ships under their charge, the same was made Felony, and the person or persons so wilfully doing or procuring the same to be done, were to suffer death.

* Job. Locin.
lib. 2. c. 4. §. 1.
Latche's Rep.
fol. 252. Scar-
borough's Case.
† Teste Camb-
deno in Britan-
nia, p. m. 149.
Locinius, lib. 2.
cap. 4. §. 1.

XII. The signification of this *Fennus Nauticum*, is by the Dutch called *Bomerie*, *Bodmerie*, *Boddemerii*; so variously pronounced from the Keel * or bottom of the Ship upon the Parallel, whereof the Rudder of a Ship doth govern and direct the same, *parte pro toto sumpta, ita primum appellata, cum etiam lingua Gallorum antiqua & Britannica Bodo vel Bodun fundum aut profundum signet † in quem navis fundum, vel ipsam navem ejusq; usum mutuo accepta est pecunia, sed postea latius pro favore nautico etiam usurpari cepit.* And the Money so taken up by the Master is done upon great extremity, and that for the completing of the Voyage when they are in distress and want in some Foreign parts; and indeed such taking up is indeed in the nature of Mortgaging the Ship, for *le Neise oblige al payment de ceo, &c.* And in the Instrument there is a Clause that expresses that the Ship is engaged for the performance of the same.

Monies that are advanced are upon two Securities, the one is on the bare Ship, the other upon the person of the borrower, sometimes upon both: The first is where a man takes up Monies and obliges himself, that if such a Ship shall arrive at such a Port, then to repay (perhaps) double the sum lent; but if the Ship happens to miscarry, then nothing.

XIII. So likewise some will take up Monies, the condition reciting, *Whereas there is such a Ship, naming her, bound to Amsterdam, whereof such a man is Master, (whereas indeed there is no such Ship or Master in nature) that if that Ship shall not arrive at such a place within twelve months, the money agreed on to be paid, shall be paid; but if the Ship shall*

shall arrive, then nothing. The first of these is honourable and just according to the laudable practice among Marine persons, and though the advantage runs high, as 20, 30, nay sometimes 40 per Cent. without consideration of time; for the monies are to be paid within so many days after the Ship's safe arrival; yet in regard the Adventure is born by the Lender, for (if the Ship perishes, the Advancer loses) the Laws and Practice of all Maritime Countries allow of the same. And therefore by the *Common Law*, if an Action of Debt be brought on such an Instrument, the Defendant cannot plead the *Statute of Usury*. And so it was adjudged where one *Sharpley* had brought an Action of Debt on a Bond for Monies taken up upon *Bottomery*: The Defendant pleads the *Statute of Usury*, and shewed that a certain Ship called the _____ made a Voyage to fish in *New-found-Land*, (which Voyage might be performed in eight months) and the Plaintiff delivered 50*l.* to the Defendant to pay 60 *l.* at the return of the Ship to D. and if the said Ship by Leakage or Tempest should not return from *New-found-Land* to D. then the Defendant should pay the principal Money; and if the Ship never returned, then nothing to be paid. Upon * Demurrer it was adjudged the same was not *Usury*: for if the Ship had staid at *New-found-Land* two or three years, yet at her return but 60 *l.* was to be paid, and if she never returned, then nothing.

Toto tit. Dig. & Cod. de Naut. sen. & Dofforum sic hardus in tit. Cod. de Naut. sen. n. 4.
*Trajectitia pecunia propter periculum creditoris quamdiu navigat navis, infinitas usuras capere potest; upon which Law it was observed by Anianus, Quia maris periculo committitur quantitas conventionis usuras hanc pecuniam dare creditor potest. Verum enimvero hic proprie non versari, damnatum fœnus, sed compensationem aliquam periculi, quod creditor contra naturam mutui in se recepit patim. Johannes Locinius, lib. 2. cap. 4. §. 1, & 2. * Trin. 6 Jac. in B. R. 2 Cro. 238. Sharpley versus Harrell.*

The other advance which is upon a fictitious supposition of a Ship and Master, where indeed there is no such in nature, is more unconscionable, the same being the common Practice that's used amongst the *Italians*, and now on this side the Water, though the same is as to internal Right unjust, yet it is daily practised, and it was not long since adjudged † that such Contract was good, according to the *Common Law* of this Realm, and that on a special Verdict.

XIV. Most certain it is, that the greater the danger is, if there be a real Adventure, the greater may the profit be of the Monies advanced: And so hath the same been the Opinion

† C. B. Hil. 22, 23 Car. 2.

Vide Carolum Molinæum de usur. q. 3. n. 92. ait, hoc approbant omnes Theologi ut creditor possit aliquid accipere ultra sortem pro susceptione periculi. But surely that must be upon

a real venture. Cl. Salmasius, cap. 9. de modo usur. fol. 380, 188, 218. *Trajectitia pecunia propter periculum creditoris, quamdiu navigat navis, infinitas usuras capere potest.* Upon which place Anianus observes, *Quia maris periculo committitur in quantas convenerit usura hanc pecuniam dare creditor potest.* Vide Novel. Const. 106. 110.

Opinion of Civilians, and likewise some Divines; though some seem to be of opinion, That any profit or advantage ought not to be made of Monies so lent, no more than of those that are advanced on simple loan, and on the peril of the borrower. However, all or most of the Trading Nations of Christendom do at this day allow of the same, as a matter most reasonable, by reason of the contingency or hazard that the Lender runs; and therefore such Monies may be advanced several ways, and a profit may arise so, that there runs a peril on the Lender.

There is likewise a second way of advancing of Monies called *Usura Marina*; joining the advanced Monies and the danger of the Sea together; and this is obliging sometimes upon the Borrower's Ship, Goods and Person: The product of which by agreement will advance sometimes 20, 30, and sometimes 40 per Cent. As for instance, A private Gentleman has 1000 l. ready Money lying by him, and he has notice of an ingenious Merchant that has good Credit beyond Seas, and understands his business fully, applies himself to him, and offers him 1000 l. to be laid out in such Commodities as the Merchant shall think convenient for that Port or Country the Borrower designs for, and that he will bear the Adventure of that Money during all that Voyage; (which he knows may be accomplished within a year) hereupon the Contract is agreed upon, 6 per Cent. is accounted for the Interest, and 12 per Cent. for the Adventure outwards, and 12 per Cent. for the Goods homeward; so that upon the return the Lender receives 30 per Cent. which amounts to 1300 l. The Lender in this case hath a good bargain, no question. Now let us see what advantage the Borrower hath.

Usura legitima ejus qui iraje-ctitiam pecuni- am trans mare vehendam fa-neratur, id est, cum periculo suo, centesima est.

1. The Borrower prevents the taking up the like Sum at Interest, which comes to 6 per Cent. and Brokage which comes now in this Age, through the generosity of the Merchant, and covetousness of the Scrivener, at 1 or 2 per Cent. more; and then the same is let out but for six Months,

months, and then the Scrivener inevitably at the six months end sends his Note, that his Friend expects his monies to be paid in ; so that to stop that gap there must be Continuation, which is at least one *per Cent.* more, besides the obliging of Friends in Securities.

2. The *Assurance* is prevented, which perhaps may come to between 5 and 20 *per Cent.* according as the Times are ; and common prudence will never suffer a Merchant to venture two parts of three parts of his Estate in one Bottom without assuring.

3. As he shall not have occasion to Ensure, so it may be a great occasion of preventing the common Obligation of his Ensuring of others: the which in a generous Merchant in honour cannot be denied, the *Premio* running reasonable.

4. It prevents the parties running the Risque and danger of the Seas, Enemies, or any other fatal loss, and hath been a means to introduce a mans Credit in a short time at lesser charge, if not to put him in a condition not to be beholden to such a fair, though chargeable means.

And this cannot be *Usury* by the Laws of this Realm, for the Risque and danger that the Lender runs.

XV. There is also another way, but that is both honest and honourable, called *Ufufruit*, that is, a Stock in a Company or Society which is perpetual ; such a Stock or Portion may be purchased, that is, the advantage or benefit arising by the improvement of the same. In the *East-India*, and in some other Companies.

As for instance, The *East-India* Company hath a *Stock* lodged in their hands by divers persons, which they in the most prudent manner as they see fit, imploy to such places as they judge most proper ; if a return is made, the advantage of that is distributed to each person that is any way entitled to that *Stock* : which advantage is called a *Dividend*, and perhaps may afford some 20 or 30 *per Cent.* But on the other hand, if that proportion of the Stock which goes out happens to miscarry, the abatement is proportionable, and so the Stock may be lessened, unless that they will stay the *Dividends* to keep up the Stock ; the

Pindfold versus Northee, Pasch. 27 Car. 2. in B.R. adjudged there on a special Verdict. which they may do; For it is a Trust reposed of so many mens Monies in their hands, to yield them such advantage as they shall upon a just account set out: So that if a man hath 1000*l.* Stock, he cannot take the same out of the Great Stock whereby to lessen the same, but he may transfer that *usu-fruit* by that Customary way which they have to any other person, for a valuable consideration *in finitum*. Such a Stock of 1000*l.* in the *East-India* Company in time of War might have been purchased for 80*l.* *Nett*; but now in time of Peace scarce got under 170, or 180*l.* the Dividends running high.

CHAP,

CHAP. XII.

Of Impositions called Great Customs, Petty Customs, and Subsidies.

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| <p>I. Impositions, whether they may be commanded without the Three Estates, and of Magna Charta touching the same.</p> <p>II. Of Impositions made voluntary by consent of Merchants, and of the adnul of the same.</p> <p>III. Of the Confirmation of the Great Charter for free Traffick; and of the Settlement now made on His Majesty of the same.</p> <p>IV. Of the Immunities formerly of the Hanſiatick Towns here in England, and when determined.</p> <p>V. Of the Antiquity of Customers or</p> | <p>Publicans as well in former Ages as at this present time, in most Nations.</p> <p>VI. Of the Imposition called Magna Custuma.</p> <p>VII. Of that which is called Parva Custuma payable by Strangers, and the Act called commonly Charta Mercatoria.</p> <p>VIII. Of Subsidy, and of what, and the Rates how set.</p> <p>IX. Of Subsidy by Strangers on Wines.</p> <p>X. Of Goods not rated how to pay.</p> <p>XI. Of the Subsidy-Duty for Cloths.</p> |
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I. **T**HAT *Impositions* neither in the time of War or other the greatest necessity or occasion that may be (much less in the time of Peace) neither upon Foreign nor Inland Commodities of what nature soever, be they never so superfluous or unnecessary, neither upon Merchants Strangers nor Denizens may be laid by the King's absolute Power without Assent of Parliament, be it never so short a time.

By the Statute of *Magna Charta*, Cap. 30. the words are, *All Merchants, if they were not openly prohibited before, shall have their safe and sure Conducts, to enter and depart, to go and tarry in the Realm, as well by Land as by Water, to buy and sell without any Evil Tolls; by the Old and Rightful Customs (except in time of War) and if they be of the Land making War against Us, and be found in Our Realm at the beginning of the War, they shall be attached without harm of Body or Goods, until it be known to Us or Our Justices how our Merchants be intreated there in the Land making War against Us.* The Statute of which this is a branch, is the most ancient Statute Law we have, won and sealed with

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the

the Blood of our Ancestors, and so revered in former times, that it hath been 29 times solemnly confirmed in Parliament.

Rot. Almaign. II. *Impositions* were in some sort done *Consensu Mercatorum*, by Edward the First, and Edward the Third: And again in Henry the Eighth, of which the House of Burgundy complained, as against the Treaty of Entercourse.

3 Ed. 3. Rot. Claus. King Henry the Third finding that such a *Modus* of Imposition tended to the destruction of Trade, and apparent overthrow of Commerce, and was against the Great Charter, made Proclamation *Anno 16.* in all Ports of England, That all Merchants might come *faciendo rectas & debitas consuetudines, nec sibi timeant de malis tollis*, for that such Impositions had no better name than *Maletolls*.

Dors. Claus. an. The like was declared and done by Edward the First in the twenty fifth year of his Reign, and Edward the Second, in the eleventh and twelfth years of his Reign.

16 Hen. 3. n. 20. And though the King cannot lay any Imposition on Merchants or Merchandize without Assent in Parliament, yet the King by his Prerogative may restrain them from Trading (if not from any Christian Foreign Prince) yet from any Infidel Realm, State, or People without his Royal Licence; And the reason of this is, for that by such Commerce it might give occasion for the relinquishment of the Catholick Faith, and an opportunity to adhere to Infidelism; and therefore generally in Edward the Third's time Licences were frequently granted with this Preamble, That the King having special trust and confidence that the party would not decline from his Faith, did license him, &c. In the seventh of King James's time this very matter came in question, upon Licence granted to a Merchant to trade to the *East-Indies*.

Vide Lane's Report in Bates's Case, this matter there debated.
Mitchelbourn and Mitchelbourn's Case. C. B. Brownlow's 2. part, fol. 296.
III. In 2 *Ed. 3.* the Great Charter for Free Traffick was Confirmed; and about some three years after there were Commissions granted for the raising of a new kind of Tallage, but the people complained; whereupon the Commissions were repealed, and he promised never to assess any but as in the time of his Ancestors.

12 Ed. 3. Memb. 22. in dors. Rot. Almaigne. But this Prerogative Power of Imposing inward and outward upon Commodities over and above the ancient Custom of Subsidy without a free consent in Parliament, is now ceased and settled; and that question which for many

Ages had been handled by the most Learned of their times, in the asserting and in the denying, will never more be remembred, the same being now establisht by Act of Parliament : which being managed for some time, was afterwards farmed out. The like having been done by former Kings, as did *Edward* the Third with the * New and Old Customs of *London* for 1000 Marks monthly to be paid unto the Wardrobe.

The Parliament having justly, honourably and voluntarily humbly presented such and many more who are establisht on his Ma-

jesty according to their several limitations. * *Claus. Anno 5 Ed. 3.*

Richard the Second, *Anno 20*. Farmed out the Subsidy of Cloth in divers Counties.

Orig. 17 Ed. 3. Rot. 2.

So *Edward* the Fourth, *Henry* the Eighth, *Queen Elizabeth*, and *King James* ; the same having been used in former Ages even in the best governed State, *Rome*, which let out Portions and Decims to the Publicans.

Vide the great Case in Mich. 4 Jac. in the Exchequer versus Bates. Lane's Rep. fol. 22.

IV. The Old *Hanse Towns*, viz. *Lubeck*, *Collen*, *Brundwick*, *Dantzick* and the rest, had extraordinary Immunities granted unto them by our Third *Henry*, for their great assistance and furnishing him in his Wars and Naval Expeditions with so many Ships ; and as they pretended the King was not only to pay them for the Service of their Ships, but for the Vessels themselves in case they miscarried : The King having concluded a Peace, and they being on their return home for *Germany*, the most considerable part of their Fleet miscarried by storm and stress of weather ; for which (according to Covenant) they demanded reparation. The good King in lieu of that which he wanted, *Money*, granted them divers Immunities ; and amongst others, they were to pay but 1 per Cent. Custom, which continued till *Queen Mary's* time, and by the Advice of *King Philip* she enhanced the 1 to 20 per Cent : The *Hans* not only complained, but clamoured aloud for breach of their Ancient Privileges confirmed unto them by long Prescription from thirteen successive Kings of *England*, and the which they pretended to have purchased with their money. *King Philip* undertook to accommodate the business, but *Queen Mary* dying, and he retiring, nothing was effected. Complaints being afterwards made to *Queen Elizabeth*, she answered, *That as she would not innovate any thing, so she would protect them still in the Immunities and Condition she found them.* Here-

upon their Navigation and Traffick was suspended a while, which proved very advantageous to the *English*, for they tryed what they could do themselves herein, their adventures and returns proving successful, they took the whole Trade into their own hands, and so divided themselves to Staplers and Merchant-adventurers; the one residing constant at one place, the other keeping their course and adventuring to other Towns and States abroad with Cloth and other Manufactures. This so nettled the *Hans*, that they devised all the ways that a discontented people could to draw upon our new *Staplers* or *Adventurers* the ill opinion of other Nations and States: but that proving but of too small a force to stop the Current of so strong a Trade as they had got footing into, they resorted to some other; whereupon they applied themselves to the Emperor, as being a Body incorporated to the Empire: and upon complaint obtained Ambassadors to the Queen to mediate the business: but they returned still *re infecta*. Hereupon the Queen caused a Proclamation to be published, *That the Merchants of the Hans should be intreated, and used as all other Strangers within her Dominions in point of Commerce, without any mark of distinction.*

This inflamed them more, whereupon they bent their Forces more eagerly, and in an Imperial Diet at *Ratisbone* they procured that the *English* Merchants, who had associated themselves in Corporations both in *Embsen* and other places, should be adjudged *Monopolists*; whereupon there was a Comitial Edict procured against them that they should be exterminated, and banished out of all parts of the Empire; which was done by *Suderman* a great Civilian. There was there at that time for the Queen as nimble a man as *Suderman*, and he had the Chancellor of *Embsen* to second him, yet they could not stop the Edict, whereby our new erected Society of Adventurers were pronounced a Monopoly: Yet *Gilpin* played his Cards so well, that he prevailed the *Imperial Ban* should not be published till after the Diet; and that in the interim his Imperial Majesty should send an Ambassador to *England* to advertise the Queen of such proceedings against her Merchants. But this made so little impression on the Queen, that the *Ban* grew rather ridiculous than formidable, for the Town of *Embsen* harboured our Merchants
notwith-

notwithstanding, and afterwards the Town of *Stode*; but the *Hansiaticks* pursuing their revenge, and they being not so able to protect them against the Imperial Ban, removed and settled themselves in *Hamburg*.

This Politick Princess, in recompence of their revenge, commanded another Proclamation to be published, 'That the *Hansiatick* Merchants should be allowed to trade in-
'to *England* upon the same Conditions as they formerly
'did, Provided the *English* Merchants might have the
'same Privileges to reside and trade peaceably in *Stode* or
'*Hamburg*, or any where else within the Precincts of the
'*Hans*. This so incensed and nettled them, that all en-
deavours were made to cut off *Stode* and *Hamburg* from
being Members of the *Hans*, or of the Empire: but the
Design was suspended till they saw the success of 88, King
Philip having promised to do them some good offices in the
Concern.

But the Queen finding that the *Hans* were not contented with that Equality she had offered to make betwixt them and her own Subjects, but were using such extraordinary means, put forth another Proclamation, 'That they should
'transport neither Corn, Victuals, Arms, Timber, Masts,
'Cables, Metals, or any other Materials or Men to *Spain*,
'or *Portugal*. And not long after the Queen growing more redoubted and famous by the Overthrow of King
Philip's Invincible Armado, (as the Pope christened it) the
Hans began to despair of doing any good, especially they
having about some 60 Sail of their Ships taken about the
River Lisbon by her Majesties Frigats, that were laden
with *Ropas de contrabanda*. She notwithstanding had
thoughts of discharging this Fleet by endeavouring a re-
concilement of the differences: but she having intelli-
gence of an Extraordinary Assembly at *Lubeck* which had
purposely met to consult of means to be revenged of her,
she thereupon made absolute Prize of those 60 Sail, only
two were freed to carry home the sad Tidings of their
Brethrens misfortune. Hereupon the *Pole* sent a ranting
Ambassador in the behalf of the *Hans*, who spake the
Injuries done to the *Hans* in a high tone. But the Queen
her self suddenly answered him in a higher, with a satis-
faction no greater than what she had done to others of the
like quality before.

This fortunate Clashing for the 19 per Cent. on the Customs, has proved ever since advantageous for *England*, our Merchants have ever since beaten a peaceful and an uninterrupted Trade into *High* and *Low Germany*; and by their constant Trade in those Parts have found a way thorow the *White Sea* to *Arch-Angel* and *Mosco*. The return of all which hath since vastly increased the *Riches* and *Strength* of *this Nation*.

*Joseph. locutus
de Pompeio. l. 1.
de Bello. Jud.
c. 5. p. 720.*

V. After the *Jews* became Tributary to *Rome*, (which was acquired by *Pompey* threescore years before the Birth of our Saviour) certain Officers or Commissioners were appointed by the *Romans* in all those places where their Victorious Standards had claimed a Conquest, who used to appoint such Officers or Commissioners to collect and gather up such Custom-money or Tribute as was exacted by the Senate. Those that gathered up these Publick payments were termed *Publicani*, *Publicans*, and by reason of their cruel and oppressive Exaction, they became hateful in all Nations.

** Sigon. de An-
tiqu. Jur. Civ.
Rom. l. 2. c. 4.
Luke 13. 2.*

Every Province had its several Society or Company of Publicans; every Society its distinct Governour: in which respect it is that *Zaccheus* is called by the Evangelists, *Princeps Publicanorum*, the chief Receiver of the Tribute, or chief Publican: And all the Provincial Governours in these several Societies had one chief Master or Superintendant residing at *Rome*, unto whom the other subordinate Governours gave up their Accounts. These Publicans were hated of all the *Roman* Provinces, but especially of the *Jews*, because though it was chiefly maintained by the *Galileans*, yet it was generally inclined unto by the *Jews*, That Tribute ought not to be paid by them. This Hatred is confirmed by the Rabbinical Proverb, *Take not a Wife out of that Family wherein there is a Publican, for such are all Publicans*. Yea, a faithful Publican was so rare at *Rome* it self, that one *Sabinus*, for his honest managing of that Office, in an honourable remembrance thereof, had certain Images with this Inscription, *καλῶς πελονήσας*, For the faithful Publican. No marvel that in Holy Writ Publicans and Sinners go hand in hand.

*H. Casaubon,
Exercit. 3. 37.*

*Sueton. in Flav.
Vesp. cap. 1.*

But now the World has been so long used to them, that in all or most Nations the particular Princes or States chuse out the most Sage and Prudent men for that Employment:

ment : And certainly the Customs of this Realm never did return to that great and clear Account as they have done under the care and prudent management of the present Commissioners : And were *Tertullian* alive, he would have recanted that Opinion of his, *That none would be a Publican but a Heathen.* (*Tertullian* printed 1609.) *de pudic. cap. 9.*

VI. Customs are Duties certain and perpetual payable to the King as the Inheritance of his Crown, for Merchandizes transported from and beyond the Seas from one Realm to another. *Magna Custuma & antiqua* is payable out of Native Commodities, *scilicet*, Wooll, Wooll-fells, and Hides, and that is certainly imposed.

And this Custom which is called *Magna Custuma*, is due to the King of common Right for four Causes :

1. For leave to depart the Kingdom, and to carry Commodities of the Realm out of it.
2. For the Interest and Dominion which the King hath in the Sea, and the Arms thereof.
3. Because the King is the Guardian of all the Ports within the Realm, & *Custos totius Regni*.
4. For Whaftage and Protection of Merchants upon the Seas against the Enemies of the Realm, and Pirates.

VII. The Custom which is called *Parva Custuma*, is a Custom or Duty payable by Merchants Strangers, and begun in the time of King *Edward* the First, when they granted him, that they would pay to him and his Heirs 1 *Eliz. Dyer*, fol. 165. 3 *d.* in the pound for all Merchandizes Exported and Imported by them, &c. And that the Charter was, and may be of great Use, I have here inserted the same, as it was faithfully transcribed out of the Roll in the *Tower*.

For

*For Merchant Strangers
concerning Liberties
granted to them.*

*Pro Mercatoribus Ali-
nigenis de Libertati-
bus eis concessis.*

31 Ed. 1. num.
44. intro.

THE KING, to his Archbishops, &c. sendeth Greeting. Concerning the good Condition of all the Merchants of the Kingdoms, Lands, and Provinces under-written: That is to say, *Germany, France, Spain, Portugal, Navarr, Lombardy, Tuscany, Provence, Catalonia*; Our Dukedoms of *Aquitain, Tholouse, Turein, Flanders, Barbant*, and all other Lands, and Foreign Places by what name soever called, coming into Our Kingdom of *England*, and there remaining.

We being very solicitous out of Our especial Care, that under Our Dominion, a freedom of Tranquillity, and full security for the said Merchants may be provided for the future, so as they may the more readily apply themselves to the service of Us, and of Our Kingdom. We graciously answering their Petitions, and ordaining more amply for securing their Condition in form following under-written, are pleased to grant to the said Merchants for Us, and Our Heirs for ever.

REX, Archiepisc. &c. Salutem. Circa bonum statum omnium Mercatorum subscriptorum Regnorum, Terrarum, & Provinciarum, videlicet, *Alemania, Franciæ, Hispaniæ, Portugaliæ, Navarr. Lombardiæ, Tuscæ, Provinciæ, Cathalonix*; Ducatus nostri, *Aquitann. Tholosan. Taurini, Flandr. Brabant* & omnium aliarum terrarum, & locorum extraneorum quocunque nomine censeantur, venientium in Regnum nostrum *Angliæ*, & ibidem conversantium.

Nos precipua cura sollicitat, qualiter sub nostro dominio tranquillitatis, & plene securitatis immunitas eisdem Mercatoribus futuris temporibus preparatur: ut itaque vota ipsorum reddantur ad nostra, & Regni nostri servicia promptiora; ipsorum Petitionibus favorabiliter annuentes, & pro statu eorundem plenius asscurando, in forma que sequitur ordinantes subscripta, dictis Mercatoribus pro nobis, & heredibus nostris in perpetuum duximus concedenda.

Imprimis

Imprimis, Videlicet, quod omnes Mercatores dictorum Regnorum & Terrarum saluo & secure sub tuitione & protectione nostra in dictum Regnum nostrum Angliæ, & ubique infra potestatem nostram alibi veniant cum Merchandis suis quibuscumque, de Muragio, Pontagio, & Pavagio, liberi & quieti, quodque infra idem Regnum & Potestatem nostram, in Civitatibus, Burghis, & Villis Mercatoris possint mercari, duntaxat in grosso, tam cum Indigenis, seu Incolis ejusdem Regni, & Potestatis nostre predictæ, quam cum Alienigenis extraneis vel privatis. Ita tamen quod Merceres que vulgariter Merceria vocantur ac Species, minaciæ vendi possint, prout interea fieri consuevit: Et quod omnes predicti Mercatores Merchandisas suas quas ipsos ad predictum Regnum & Potestatem nostram adducere, seu infra idem Regnum & Potestatem nostram emere, vel alias acquirere contigerit, possint quo voluerint, tam infra Regnum & Potestatem nostram predictam, quam extra ducere, seu portari facere, præterquam ad terras manifestorum & notiorum hostium Regni nostri, solvendo consuetudines

Imprimis, That is to say, That all Merchants of the said Kingdoms and Lands, may come from any other place safe and secure under Our Tuition and Protection into our said Kingdom of England, and every where within Our Dominion, with their Merchandizes of what sort soever, and be unmolested and quiet concerning

* Murage, † Pontage, and † Pavage, and that within Our said Kingdom and Dominion, they may traffick in the Cities, Burroughs, and Market Towns, only in gross, as well with Natives or Inhabitants of this Our Kingdom and Dominion aforesaid, as with Strangers, Foreign and Domestick: but so, as their Wares vulgarly called Mercery, or the SPECIES thereof, they may sell by retail, as formerly hath been accustomed. And that all the said Merchants may carry, or cause to be carried whither they please, their Merchandize which they have brought into Our said Kingdom and Dominion, or otherwise: required, except to the Lands of the manifest and notorious Enemies of Our Kingdom, paying the Customs which shall be due, Wines only excepted, which shall not be exported out of Our said Kingdom

* Repairing
publick Walls.
† Bridges.
‡ Pavements.

dom

dom or Dominion, after they have been imported into Our said Kingdom or Dominion, without Pleasure and special Licence, by any way or means whatsoever.

Item, That the said Merchants may lodge in the Cities, Boroughs, and Towns aforesaid, at their own pleasure, and there stay with their Goods, to the content of them who entertain them.

Item, That every Contract made by the said Merchants with what persons soever, and from what places soever, for what kind of Merchandizes soever, shall be firm and stable, so that neither of the Merchants shall depart from, or go back from his bargain, after a *Gods-penny* is given and received between the principal persons contracting; and if it happen that a contention arise on the said Contract, there shall be a Trial, Vr Inquisition, according to the Usages and Customs of the Fairs, and Towns where such Contract shall be made or begun.

Item, We promise to the aforesaid Merchants, and for Us, and our Heirs for

quas debebunt, Vinis duntaxat exceptis, que de eodem Regno, seu Potestate nostra, postquam infra idem Regnum, seu Potestatem nostram ducta fuerint, sine voluntate nostra, & licentia speciali, non liceat eis educere quoquo modo.

Item, Quod predicti Mercatores, in Civitatibus, Burgis predictis pro voluntate sua hospitari valeant, & morari Villis ac cum bonis suis, ad gratum ipsorum quorum fuerint hospitia sive domus.

Item, Quod quilibet contractus per ipsos Mercatores cum quibuscunque personis, undecunque fuerint, super quocunque genere Merchandise, initus, firmus sit & stabilis; ita quod neuter Mercatorum ab illo Contractu possit discedere, vel resilere, postquam denarius Dei inter principales personas contrahentes, datus fuerit & receptus. Et si forsan super contractu huiusmodi contentio oriat, fiat inde probatio aut inquisitio secundum usus & consuetudines Fieriarum, & Villarum ubi dictum Contractum fieri contigerit, & iniri.

Item, Promittimus prefatis Mercatoribus pro nobis, & heredibus nostris, in perpetuum

perpetuum concedentes, Quod nullam prisam vel arrestationem, seu dilationem occasione prisæ de cætero de Mercimoniis, Merchandis, seu aliis bonis suis per nos, vel alium, seu alios, pro aliqua necessitate vel casu, contra voluntatem ipsorum Mercatorum aliquatenus faciemus, aut fieri patiemur; nisi statim soluto pretio pro quo ipsi Mercatores aliis hujusmodi mercimonia vendere possint, vel eis alias satisfactio ita quod reputent se contentos, & quod super mercimonia, merchandis, seu bona ipsorum per nos, vel ministros suos, nulla appreciatio, aut æstimatio imponetur.

Item, Volumus, Quod omnes Ballivi, & Ministri Feriarum, Civitatum, Burgozum & Villarum Mercatoriarum, Mercatoribus antedictis conquerentibus contra eis, celerem justitiam facient de die in diem sine dilatione secundum LEGEM MERCATORIAM, de universis & singulis que per eandem Legem poterunt terminari. Et si forte inveniatur defectus in aliquo Ballivozum vel Ministrorum predictorum unde idem Mercatores, vel eorum aliquis dilectus incommota

ever grant, That We by no means whatsoever will make, nor suffer to be made any Prize, or Arrest, or Detention by occasion of Prize, for the future, upon their said Wares, Merchandizes, or other their Goods by Us, or by any other, or others in any case and necessity whatsoever, against the will of the said Merchants, without the price presently paid, for which the said Merchants might sell to others, Wares of the like sort for, or otherwise to satisfy them, so as they shall repute themselves contented. And that no Appraisement or Value shall be put upon the said Merchants Wares, Merchandizes or Goods, by Us or Our Ministers.

Item, We will, That all Bailiffs, and Officers of Fairs, Cities, Boroughs, and Market Towns, shall do speedy Justice to the said Merchants complaining to them, from day to day, without delay, according to the *Merchants Law*, concerning all and every thing which by the said *Law* may be determined. And if any defect shall happen to be found in any of Our Bailiffs or Ministers aforesaid, whereby the said Merchants, or any of their Factors shall suffer loss, although

though the Merchant recover his losses against the party in the whole, yet nevertheless, the Bailiff, or other Ministers of ours, as the fault requires, shall be punished; and We grant the said Punishment in favour of the Merchants aforesaid, for compleating their right.

Item, That in all kinds of Pleas, saving in the case of crime, for which the pain of Death is liable to be inflicted, where the Merchant shall be impleaded, or he implead another, of whatsoever condition he that is impleaded be of, whether a Foreigner or a Domestick, in the said Fairs, Cities, or Boroughs, where there is a sufficient plenty of Merchants of the Lands aforesaid, and Inquisition there ought to be made; half of the Inquisition shall be of the said Foreign Merchants, and the other half of honest and lawful men, where the Plea happensto be: And if a sufficient number of the Merchants of the said Lands shall not be found, let those be put in the Inquisition who shall be found fit in that place, and let the residue be of other good and fit men, in the places in which that plaint shall be.

sustinuerint, vel sustinuerint, licet Mercator versus partem in principali recuperaverit dampna sua, nihilominus Ballibus, vel Minister alius versus Nos, pro delictum erigit, puniatur, & punitionem istam concedimus in favorem Mercatorum predictorum, pro eorum justitia maturanda.

Item, Quod in omnibus generibus placitorum, salvo casu criminis pro quo indigenda sit poena mortis, ubi Mercator implacitatus fuerit, vel alium implacitatus fuerit, cujuscunque conditionis idem implacitatus extiterit, extraneus vel habitatus, in Ruridinis, Civitatibus, sive Burgis ubi fuerit sufficiens copia Mercatorum predictarum terrarum, & inquisitio fieri debeat, sit medietas Inquisitionis de eisdem Mercatoribus, & medietas altera de aliis probis & legalibus hominibus loci illius, ubi placitum illud esse contigerit: Et si de Mercatoribus dictarum Terrarum numerus non inveniatur sufficiens, ponantur in Inquisitione illi qui idonei inveniuntur ibidem, & residui sint de aliis bonis hominibus & idoneis, de locis in quibus placitum illud erit.

Item, Volumus, Ordinamus, & Statuimus, Quod in qualibet Villa Mercatoria, & Feria Regni nostri predicti, & alibi infra Potestatem nostram, Pondus nostrum in certo loco ponatur, & ante ponderationem Statera in presentia emptoris & Venditoris vacua videatur, & quod brachia sint equalia, & ex tunc ponderato, ponderet in equali, & cum Stateram posuerit in equali, statim amoveat manus suas ita quod remaneat in equali, quodque per totum Regnum & Potestatem nostram unum sit pondus & una mensura, & signo Standardi nostri signentur, & quod quilibet possit habere Stateram unius Quarteroni & infra, ubi contra Dominum loci, aut libertatem per Nos, seu Antecessores nostros concessam illud non fuerit, sive contra Villarum aut Fierarum consuetudinem hactenus observatam.

Item, Volumus & constitimus, Quod aliquis certus homo, & fidelis, & discretus London residens, assignetur Justiciarius Mercatoribus memoratis, coram quo valeant specialiter placitare, & debita sua recuperare celeriter, si Micercomites & Majores eis non facerent de die in diem celeris

Item, We will, Ordain, and appoint, That in every Market Town and Fair of Our said Kingdom, and elsewhere within Our Dominion, Our Weight is to be put in a certain place, and before weighing thereof, the Scale to be empty in the presence of Buyer and Seller, and the Arms thereof to be equal, and when he hath set the Scale equal, he is forthwith to take off his hands, so that it may remain equal, and that throughout Our whole Kingdom and Dominion, there be one Weight and Measure, both of them sealed with the Sign of Our Standard, and that every one may have a Scale of one Quarteroni and under, where contrary to the Governour of the said place, or Liberty by Us, or Our Ancestors was not granted, or contrary to the Custom of the Villages and Fairs hitherto observed.

Item, We will and grant, That some certain faithful and discreet person residing in London, may be appointed a Justice in behalf of the before-mentioned Merchants, before whom they may plead specially, and more speedily recover their debts, if the Sheriffs and Mayors distribute not to them, day by

by day compleat and speedy Justice; that then a Commission be granted to the aforesaid Merchants, besides this present Charter, *viz.* concerning those [Goods] which are to be conveyed between Merchants and Merchants, according to the *Merchants Law*.

Item, We Ordain and Appoint, and Our Will and Pleasure is, for Us and Our Heirs, That this Ordinance and Statute be firmly kept for ever, notwithstanding any liberty whatsoever which We or Our Heirs for the future shall grant; the said Merchants ought not to lose their above-written Liberties, or any of them: And for and in consideration of their obtaining the said Liberties and free Usages, and Our Prises to be remitted to them: All and singular the said Merchants for themselves, and all others on their part, have heartily and unanimously granted to Us that for every *Hogshead of Wine* which they shall bring in, or cause to be brought in within Our Kingdom or Dominion thereof; and from whence they are obliged to pay Freight to the Mariners, to pay to Us and to Our Heirs, by the name of Custom, two shillings over and above the ancient Customs

justitiæ complementum, & inde fiat Commissio extra chartam presentem concessa Mercatoribus antedictis, scilicet, de hiis que sunt inter Mercatores & Mercatores, secundum LEGEM MERCATORIAM deducenda.

Item, Ordinamus & Statuimus, & Ordinationem illam Statutumque pro Nobis & Heredibus nostris in perpetuum Volumus firmiter observari, quod pro quacunque libertate quam Nos vel Heredes nostri de cetero concedimus, prefati Mercatores supra-scriptas Libertates, vel earum aliquam non amittant. Pro supradictis autem Libertatibus & liberis Consuetudinibus obtinendis, & Prisis nostris remittendis eidem supradicti Mercatores universi & singuli pro se & omnibus aliis de partibus suis, Nobis concorditer & unanimiter concesserunt quod de quolibet Dolio vini quod adducunt, vel adduci facient infra Regnum & Potestatem nostram, & unde Marinariis fretum solvere tenebuntur, solvent Nobis & Heredibus nostris nomine Customæ, duos Solidos ultra antiquas Customas debitas, & in Denariis solvi consuetas, nobis aut aliis infra

infra quadraginta dies postquam extra Paves ad Terram posita fuerint dicta vina.

Item, De quolibet Sacco Lanae, quem dicti Mercatores, aut alij nomine ipsorum ement, & de Regno nostro educunt, aut emi, & educi facient, solvent quadraginta Denarios de incremento, ultra Custumam antiquam dimidia Marcæ que prius fuerat persoluta. Et pro Lasso Coziorum extra Regnum & Potestatem nostram vehendorum dimidiam Marcam, supra id quod ex antiqua Custuma antea soldebatur; Et similiter de trecentis pellibus Lanutis, extra Regnum & Potestatem nostram, deducendis, quadraginta denarios ultra certum illud quod de antiqua Custuma fuerat prius datum.

Item, Duos Solidos de qualibet Scarleta, & panno tincto in grano.

Item, Decem & octo denarios de quolibet panno in quo pars grani fuerit intermixta.

Item, Duodecim denarios de quolibet panno alio sine grano.

Item, Duodecim denarios de quolibet Ceræ quintallo.

due, and accustomed to be paid in pence within forty days after the said Wines are put on shore out of the Ships.

Item, For every Sack of Wooll, which the said Merchants or others in their names do buy, and out of this Kingdom transport, or buy to transport, shall pay forty pence over and above the ancient Custom of half a Mark, which formerly was paid. And for a Last of Hides carried out of this Our Kingdom and Dominion thereof, to be sold, half a Mark over and above that which according to ancient Custom was formerly paid; and likewise for three hundred Woollfels to be carried out of this Kingdom, forty pence, besides that certain sum which according to ancient Custom was formerly given.

Item, Two Shillings for every Scarlet, and Cloth dyed in grain.

Item, Eighteen pence for every Cloth in which part of a grain-colour is intermixt.

Item, Twelve pence for every other Cloth without grain.

Item, Twelve pence for every Quintal of Wax.

H h

And

* It is supposed
it should be Sin-
donibus, of
Lawn, Cam-
brick, or other
fine Linen.

And whereas some of the said Merchants deal in other Commodities, as Goods weighed with *Avoir-du-pois* Weights, and in other fine Goods, as Cloth of *Tarsen*, of Silk, or * *Cindatis*, of Hair, and in divers other Merchandizes, in Horses also, and other animals, Corn, and other Wares and Merchandizes of different sorts, which cannot easily be put to a certain rate of Custom; The said Merchants have consented to give Us and Our Heirs for ever Twenty shillings Estimation and value of those Wares and Merchandizes, by whatsoever name they be called, three pence in the pound, upon the Entrance of their Wares and Merchandizes into Our Kingdom and Dominion aforesaid, within twenty days after such Wares and Merchandizes shall be brought into Our Kingdom and Dominion aforesaid, and there shall be unladen, or sold. And likewise three pence for every twenty shillings, at the Exporting of what kind soever of Wares or Merchandizes bought in Our Kingdom & Dominion aforesaid, besides the ancient Customs formerly given to Us, or to others. And over and above the value and estimation of the said Wares

Cumque de prefatis Mercatoribus nonnulli eorum alias exercent Merchandisas, ut de Avero ponderis, & de aliis rebus subtilibus, sicut de pannis Tarsen, de Serico, de Cindatis, de Seta, & aliis diversis mercibus, & de equis etiam, ac aliis animalibus, Blado, & aliis rebus, & Merchandis multimodis, que ad certam Customam facile poni non poterunt, iidem Mercatores concesserunt dare Nobis & Heredibus nostris de qualibet libra argenti estimationis seu valoris rerum, & Merchandisarum huiusmodi quocunque nomine censeantur, tres denarios de libra in introitu rerum, & Merchandisarum ipsarum in Regnum & Potestatem nostram predictam infra viginti dies postquam huiusmodi Res & Merchandise in Regnum & Potestatem nostram adducte, & etiam ibidem exonerate, sive vendite, fuerint. Et similiter tres denarios de qualibet libra argenti in educatione quarumcunque rerum, & Merchandisarum huiusmodi exportarum in Regno & Potestate nostra predictis, ultra Customas antiquas nobis, aut alijs ante datas. Et super valore & estimatione rerum & Merchandisarum huiusmodi, de quibus tres denarii

denarij de qualibet libra argenti sicut predictur sunt solvendi; credatur eis per literas quas de Dominis aut sociis suis ostendere poterunt, & si literas non habeant, Stetur in hac parte ipsorum Mercatorum si presentes fuerint, vel valletorum suorum in eorundem Mercatorum absentia juramentis.

Liceat insuper Sociis de Societate Mercatorum predictorum infra Regnum & Potestatem nostram predictam, lanas vendere aliis sociis suis, & similiter emere ab eisdem absque Custuma solvenda; ita tamen quod dictæ Lanæ ad tales manus non deveniant, quod Custuma nobis debita defraudemur.

Et præterea est sciendum, Quod postquam sæpediti Mercatores semel in uno loco infra Regnum & Potestatem nostram Custumam nobis concessam superius, pro Merchandis suis in forma solverint supradicta & suum habeant inde Warrantum, erunt liberi & quieti in omnibus aliis locis infra Regnum & Potestatem nostram predictam, de solutione Custumæ hujusmodi pro eisdem Merchandis, seu mercimoniis per idem Warrantum, &ve hujusmodi

and Merchandizes for which three pence for every twenty shillings as aforesaid are to be paid; they are to have credit by Letters, by them to be produced from their Principals or Partners, and if they have none, Let it be determined in this case, by the Oaths of the said Merchants, or in their absence, of their Servants.

Moreover, It may be lawful for the Society of the Merchants aforesaid, to sell Wooll to the Fellows of the said Society, and likewise to buy the same one of another within Our Kingdom and Dominion, without payment of Custom: Provided that the said Wooll come not to such hands whereby we may be defrauded of Our Customs.

And furthermore be it known, That after the said Merchants have once in any one place within Our Kingdom and Dominion paid our Customs granted, as aforesaid, to Us, for their Merchandizes in form aforesaid, and thereupon they have their Warrant, they shall be free, and unmolested in all other places within Our Kingdom and Dominion, from payment of the said Custom for the same Commodities or Merchandizes by the said Warrant,

whether such Merchandizes remain within Our Kingdom and Dominion, or are carried out, Except Wines which without Our leave or licence, as aforesaid, are by no means to be Exported out of Our Kingdom.

We will also, and for Us and Our Heirs grant, That no Exaction, Prise or Loan, or any other burden shall be imposed in any part or measure on the persons of the said Merchants, their Merchandizes, or Goods contrary to the form before expressed and granted.

Witness hereto, The Reverend Fathers Robert Archbishop of Canterbury Primate of all England, Walter Bishop of Coventry and Litchfield, Henry de Lacy Earl of Lincoln, Humphrey de Bohun Earl of Hereford and Essex, and Constable of England, Adomarus of Valentia, Galfrid of Geynvil, Hugh de le Spencer, Walter de bello Campo Chamberlain of our House, Robert of Bures, and others. Given by Our Hand at Westminster the First day of February.

Merchandisæ infra Regnum & Potestatem nostram remaneant, sive exterius deferantur, Exceptis vinis quæ de Regno & Potestate nostra predictis, sine voluntate & licentia nostra sicut predictum est, nullatenus educantur.

Volumus autem, ac pro Nobis & Hæredibus nostris concedimus, Quod nulla Cratio, Visa vel Prestatio, aut aliquod aliud onus super personas Mercatorum predictorum, Merchandisas, seu bona, eorundem aliquatenus imponatur, contra formam expressam superius, & concessam.

Hijs testibus venerabilibus Patribus Roberto Cantuariensi Archiepiscopo totius Angliæ Primæ, Waltero Coventræ & Litch. Episcopo, Henrie de Lacy, Comite Lincoln. Humfrido de Bohun Comite Hereford. & Essex. ac Constabular. Angl. Adomar. de Valentia, Galfrido de Geynwill, Hugone le de Spencer, Waltero de bello Campo Senescallo Hospitii nostri, Roberto de Bures & alijs. Dat. per manum nostram apud Westm. primo die Feb.

Sir John Davies in the Case of Customs.

VIII. Subsidy is a Duty payable for Merchandizes Exported and Imported, granted by Act of Parliament for the life of the King. And are,

I. Aids

1. Aids and Subsidies payable out of Native Commodities Exported and Imported.

2. *Tunnage*, which is a Subsidy out of Wines of all sorts; and *Poundage*, which is a Subsidy granted out of all Commodities Exported and Imported, except Wines and ancient Staple Commodities, and is the twentieth part of the Merchandize, Imposts or Duties payable for Merchandizes rated and assessed by Parliament; and then they are in the nature of Subsidies imposed by the Kings Prerogative. *Vide the Stat. 12 Car. 2. of Tunnage and Poundage.*

The Rates are generally agreed on by the Commons House of Parliament, and are expressed in a Book commonly called the *Rates of Merchandize*; that is to say, the Subsidy of Tunnage and Poundage, and the Subsidy of Woollen Clothes or old Drapery, and are subscribed with the hand of the Speaker.

IX. All Merchant-Strangers bringing in any sort of Wines, are to pay Thirty shillings on the Tun over and above the Rates which the Natives pay, including Twenty shillings the Tun formerly paid to His Majesty by the name *Southampton Duties*, for all Wines of the growth of the *Levant*; for which sort of Wines, the Stranger is also to pay to the use of the Town of *Southampton* for every Butt or Pipe Ten shillings.

Aliens are likewise to pay the ancient Duty of Butle- *Vide in tit. Pri- sage.*
rage, which is 2 s. per Tun.

Rule, *That all such Wines as shall be landed in any of the Out-Ports, and Custom paid, and afterwards brought to the Port of London by Certificate, shall pay so much more Custom as they paid short of the Duty due in the Port of London.*

For every Tun of Beer to be Exported in shipping Eng- *Directions in Tunnage.*
lish built in money must be paid Two shillings: And for every Tun of Beer Exported in any other shipping in money six shillings.

X. If there shall happen to be brought or carried out of this Realm any Goods liable to the payment of Custom and Subsidy which are omitted in the Book of Rates, or are not now used to be brought in or carried out, or by reason of the great diversity of the value of some Goods could not be rated; That in such case every Customer or Collector for the time being, shall and may levy the said Custom and Subsidy of Poundage according to the value *Directions in Poundage.*

Directions for
the payment
of the Subsidy
upon Woollen
Clothes or old
Drapery.

and price of such Goods to be affirmed upon the Oath of the Merchant in the presence of the Customer, Collector, Comptroller and Surveyor, or any two of them.

XI. Every *English* man shall pay for every short Cloth containing in length not above 28 Yards, and in weight not above 64 *l.* white or coloured by him to be shipped and carried out of this Kingdom, Three shillings four pence, being after the rate of two farthings and half a farthing the pound weight.

And so after that rate for all other sorts of Clothes of greater length and weight, allowing not above Twenty eight Yards, and sixty four pound to a short Cloth; that is to say, for every pound weight over and above sixty four pound, two farthings and a half farthing: and for all other sorts of lesser Clothes to be allowed to a short Cloth; that is to say, every Stranger shall pay for every short Cloth *cont'* in length not above 28 yards, and in weight not above 64 *l.* white or coloured by him to be shipped or carried out of this Kingdom, Six shillings eight pence, besides the old Duty of one shilling and two pence.

And so after that rate for all other sorts of Clothes of greater length and weight; and for all sorts of lesser Clothes to be allowed to a short Cloth; That is to say,

Dorset and *Somerset* Dozens, *Rudge washt*, *Cardinals*, *Pinkwhites*, *Straits*, *Statutes Stockbridges*, *Tarvestock*, seven of each sort shall be allowed to a short Cloth.

Tauntons, *Bridgwaters*, and *Dunstars*, the fifth not exceeding 64 *l.* in weight; *Devon*. Dozens containing 12 or 13 yards, in weight 13 *l.* five to be allowed to a short Cloth.

Ordinary *Pennystones*, or *Forest Whites* *cont'* between 12 or 13 yards, and in weight 28 pounds, *Shorting Pennystones* *cont'* 13 or 14 yards, and in weight 35 pounds unfrized, four to be allowed to a short Cloth.

Narrow *Yorkshire* Kerfies Whites and Reds, *cont'* not above 17 or 18 yards, and in weight 22 pound. *Hampshire* ordinary Kerfies, *Newberry* Whites, and other Kerfies of like making *cont'* 24 yards, and in weight 28 *l.* *Sorting Hampshire* Kerfies *cont'* 28 pound, and in weight 32 pound; Three of them to make a short Cloth.

Northern Dozens, single sorting *Pennystones* *cont'* between 13 and 15 yards, and in weight 53 pound Frized,
Two

Two of them to make a short Cloth.

And the Northern Dozens double, one to be accounted for a short Cloth.

All which shall go and be accounted for short Clothes, and shall pay after the rate of the short Cloth before rated, and for over-weight two farthings and one half the pound.

The New sort of Cloth called the *Spanish* Cloth, otherwise Narrow Liff, Western Broad Cloth not exceeding 25 yards in length, and 43 pounds in weight, to be accounted two thirds of the short Cloth before rated.

And for every pound weight exceeding 43 pounds, two farthings and half a farthing the pound weight.

Cloth Rashes *alias* Cloth Serges *cont* 30 yards weighing 40 pound, to be accounted two thirds of the short Cloth before rated.

And for every pound exceeding 40 pound weight, two farthings and half a farthing the pound weight.

And for any other sort of Woollen Cloth of the Old or New Drapery, and not mentioned in that Book, to pay two farthings and half a farthing the pound weight: And for any other sort of Woollen Cloth of the Old or New Drapery and not mentioned, is to pay two farthings and half a farthing for the Subsidy of every pound thereof.

C H A P. XIII.

Of Impositions Subsequent, Conditional,
Temporary, &c.

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| <p>I. Of Impositions on the Manufactures of France by <i>Lex Talionis</i>.</p> <p>II. On Vinegar, Perry, Cider, and Rape, Customs payable by Denizens and Strangers, and Log-wood made Importable.</p> <p>III. On Ships that have not two Decks, and 16 Guns.</p> <p>IV. On Salt, Beer, Cider, Perry, Vinegar, a further Duty.</p> <p>V. Of the Duty called Coynage, and upon what imposed; and the temporary Imposition called the Additional Duty.</p> <p>VI. Of Goods particular Imported by Aliens; and Rules for petty Customs and other matters relating to Duties.</p> <p>VII. Of Aliens Customs on Fish and other Commodities, and Rates upon the same.</p> | <p>VIII. Impositions on Foreign Liquors, and Rates on the same.</p> <p>IX. Of Native Commodities, and such as were formerly prohibited may be transported, paying certain Duties.</p> <p>X. Beer, &c. Exported; Skins, Leather, &c. Transportable, paying such Duties—Bulloign and Coyn only excepted.</p> <p>XI. Of Spices Importable by any Nation.</p> <p>XII. Of great and lesser Officers Fees, and of Goods not paying one pound Custom in or out, what Fees to be taken.</p> <p>XIII. Voluntary Gifts from some esteemed on Bribes; and Rates about payment of Fees.</p> <p>XIV. Of Allowances for Jury, what.</p> |
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Subsequent
Impositions
to the Act of
Tunnage and
Poundage, and
the Book of
Rates.

12 Car. 2.

This collected
as the Tun-
nage and
Poundage is
directed.

I. **T**Here are several Duties imposed subsequent to the Duties payable by the Book of Rates, and over and above the same; that is to say, on all Ships belonging to the *French Kings* Subjects, which shall lade or unlade any Goods in this Kingdom, or set on shore or take in any Passenger, or pay 20 s. *per Tun*: This was an *Oliver* for a *Rowland*, the *French King* having done us the like kindness, by imposing the value of 50 *Solz* on every *English Ship*; this complement lasts but three weeks longer than the *French King's*, his removed, ours drops.

II. So likewise on Vinegar, Perry, Rape, Cider, and Cider-eager imported from Foreign parts *per English*, shall answer Six pounds ten shillings *per Tun*; if by Strangers, then but six pounds.

But if they shall Export, then Three pounds ten shillings

lings *per Tun* shall be repaid to the *English*, and Four Pounds fifteen shillings to be repaid to Strangers.

14 Car. 2. c. 11.
For prevent-
ing of Fraud.

The Statute of *Eliz. cap.* prohibiting the Importation of Logwood repealed; and the same may be Imported paying 5 *l. per Tun*: and in case of Exportation then to be repaid 4 *l. per Tun*.

14 Car. 2. c. 11.

III. The Parliament taking likewise again into consideration the encouragement of Trading in Ships of force, have imposed on all Goods and Merchandize imported and exported from and to the Mediterranean Sea, beyond *Malaga*, in any Ship that hath not two Decks and sixteen Pieces of Ordnance mounted, and two men to each Gun, to pay over and above the Rates imposed by the Book of Rates one *per Cent.*; this does not extend to Ships laden with Fish, or half laden with Fish and other Commodities.

14 Car. 22.
cap. 11.

IV. So likewise on Salt out of *Scotland* into *England*, one half-penny *per Gallon*.

Again, there is imposed on Wines, Vinegar, Cider and Beer, ten shillings *per Tun*; and on Brandy and Strong Waters 20 *s. per Tun*. For the Coynage Duty, the monies that arise on this Duty are to be paid at the Custom-House to the Collectors and other Officers, to be by them kept apart from all other Monies, and paid Quarterly into the Exchequer without Salary or Fee: The Goods are forfeitable for non-payment of this Duty; and the same is to be repaid, if the Goods are transported within one year.

13 Car. 2.
cap. 5.

V. There was likewise an Imposition of 12 *l. per Tun* on *Spanish* Wines, and 8 *l. per Tun* on *French* Wines and Vinegar, which was but temporary, and ended the 24th of *June*, 1678.

22 Car. 2. c. 3.

VI. There are also Duties payable by Aliens for Goods imported in Aliens Ships, commonly called *Navigation-Duties*.

Per Act of
Nav. 12 Car.
cap. 18. Vide
the Statutes,
and the particu-
lar Com-
modities enu-
merated
there.

So likewise all Goods of the growth, product, or Manufacture of *Muscovia* or *Russia*, and also of *Turkey*.

Note, That in all cases where petty Custom inwards is payable, it is to be understood of the fourth part of the full Subsidy according to the Rates and Value in the Book of Rates before the 5 *per Cent.* is deducted.

Rule.

Note,

Rule.
Vide the Table
of Strangers
Duties upon
Wines.

14 Car. 2. Vide
Table of
French Wines.

Act of Navi-
gation, 12 Car.
2. cap. 18.

Act of Trade,
15 Car. 2. cap.
7. Vide Stat.
and the par-
ticular enu-
merated.

Rule.

12 Car. 23, 24.
22 Car. 2. 4.

15 Car. 2. c. 11.

Act for Trade,
15 Car. 2.
cap. 7.

Act for Til-
lage, 22 Car. 2.
cap. 3.

22, 23 Car. 2.
29 Car. 2. cap. 5.

Note, Wines of all sorts imported are to pay Aliens Duties.

Note, That the Nett Subsidy of Vinegar, Perry, Rape, Cider, and Cider-eager both in *London* and out-Ports, is the same with the Subsidy of *French Wines*, payable in *London*.

VII. So likewise there is a further Imposition called Aliens Custom for all Fish, Oil, Blubber, Whale-bone, or Whale-fins, not being caught in Vessels belonging to *English* men, are to pay double Strangers Custom.

So likewise Custom and Impost to be paid for several sorts of salted or dried Fish not imported in Ships *English* built, or belonging to *England*, and not having been stified and caught in such Ships.

Upon which ACT, *Note,* That the 5 per Cent. is not to be allowed out of the petty Custom.

VIII. There is likewise an Excise or Impost upon Foreign Liquors imported; that is to say, Beer or Ale 6 s. per Barrel; Cider or Perry the Tun ten shillings; Brandy or Strong-waters perfectly made, 8 d. per Gallon.

If any of those Goods be landed before those Duties be fully paid, and Warrants signed, and without presence of an Officer, they are forfeited to the Informer half.

IX. There are likewise Duties imposed on several Commodities Exported by several Acts of Parliament subsequent to the Act of Tunnage and Poundage.

Coals transported in *English* Shipping and Navigation for his Majesties Plantations in lieu of all Custom, shall pay only for one Chaldron of *New-Castle* measure 1 s. 8 d. For one Chaldron *London* measure 1 s. provided good Security be given for landing the said Coals accordingly.

There are likewise several Native Commodities and Cattel prohibited by divers Acts of Parliament not to be transported unless sold under such prizes; but *non obstante* they may now be exported, paying Custom according to the Book of Rates.

X. There is likewise an Imposition on Beer, Ale, and Mum to be exported, to pay 1 s. per Tun and no more; but this but *pro-tempore* for six years.

So likewise Leather of all sorts, Sheeps-skins, Calveskins, tanned or dressed, *non obstante* any former Law, paying for each hundred weight cont' 112 l. weight one shilling

ling and no more : This ended in 25th of March, 1675. 20 Car. 2. cap. and both of them to the end of the next Sessions of Parliament after.

Likewise all sorts of Foreign Coyne or Bullion of Gold or Silver may be Exported without paying any Duty or Fee for the same, Entry being first made in the Custom-house; the like for Diamonds, Precious Stones, Jewels, and Pearls of all sorts. Act for Trade; 15 Car. 2. cap.

XI. All persons whatsoever may import from any place beyond Sea in *English Ships*, Mace, Nutmegs, Cinamon, Cloves into *England, Wales, Jersey, Guernsey*, paying the Customs thereof. Provided before the lading thereof they give notice to the Commissioners or Farmers of the Customs, of the quantity and quality they intend to lade, with the name of the Vessel in which they intend to import the same, and procure a Licence under the hands of the said Farmers or Commissioners, or any three of them for the importing the same. Proclam. Car. Regis, Dec. 20. 1662. Aug. 26. 1663. But see 14 Car. 2. concerning Customs.

Note, If Goods are wreck'd, and the Lord siezes them, yet they ought not to pay Custom*. * Sir Francis Moor's Report, fol. 224. Lord

Cabon's Case. The like not long since adjudged in the *Common-Pleas* (on a Special Verdict found at *St. Edmonds-Bury* in *Suffolk*) about Mich. 25. or Hill. 25. & 26 Car. 2. (on a Special Verdict found at St. Edmonds-Bury in Suffolk.) about Mich. 25. or Hill. 25. & 26 Car. 2.

XII. Fees and Allowances due and payable to the Officers of his Majesties Customs and Subsidies in the Port of *London*, and the Members and Creeks thereunto belonging; that is to say, to the Officers of the petty Customs Outwards, Subsidy Outwards; Petty Customs Inwards, Subsidies Inwards; Great Customs, Clerks Fees inwards and Outwards, the Kings Waiters being in number Eighteen, the Register of the King's Warrants, the Usher of the Custom-House, Gaugers of *French Vessels*, chief Searcher, and his Majesties five under-Searchers in the Port of *London*; and the two Searchers at *Gravesend*, were all set and entred in a Table; the same was setled by the Commons House of Parliament, and signed by the Right Honourable Sir *Edward Turner* late Lord Chief Baron of his Majesties Court of *Exchequer*, and then Speaker to the Commons House of Parliament; at which time the Question being put, That for all Goods not paying one pound Custom in or out, there shall be but half Fees taken for all Coquets, Warrants, Debentures, Transires or Certificates; Virtute cuiusdam Ordin. à Dom. Com. Sabati 17 Maij, 14 Car. 2. Regis,

cates; it was resolved in the affirmative.

XIII. Societies or Companies trading in a joint stock, and making but one single Entry, the Adventurers being many, the Table of Fees does not hinder; but the Officers and Waiters may receive such gratuity as the Company shall voluntarily give.

All Goods under the value of 5*l.* in the Book of Rates, paying Subsidy the Sum of 5 *s.* or less, shall pass without payment of Fees.

English Merchants that shall land out of one Ship at one time (although the receipt of the Subsidy be distributed into several Offices) shall not pay any more than for a single Entry.

The Goods of Partnership to pass as if the propriety were in one single person.

Fish by *English* in *English* Shipping or Vessels Inwards or Outwards all along the Coast to pay no Fee.

Post-entries inward to pass without Fee under five shillings; if above five shillings and under forty shillings, then six pence: but if the Custom to be paid exceed 40 *s.* then full Fees.

The Merchant shall pay for all Goods opening that shall be short entred above 10 *s.* Custom.

The Merchant shall pay for weighing of all Goods that shall be short entred above 20 *s.* Custom.

The Merchant is not to be at any charge, if duly entred.

Tare and Tret, the first is the weight of the Cask, or Bale, or Covering wherein Goods are packed; the other is a consideration allowed in the weight for emptying and refelling the Goods,

XIV. There is likewise to be allowed to the Merchants a certain abatement called *Tare*, for Goods and Merchandize, the which is reduced into a Table, and cannot be deviated from in any case within the Port of *London*, without special direction of the Commissioners or Farmers; or in their absence of the consent of the General Surveyors, and Surveyor of the Ware-house, or of two of them at the least, whereof the Surveyor of the Ware-house to be one; and in the out-Ports not without the consent and advice of the Collector and Surveyor: or where there is no Surveyor, by the Collector himself, giving speedy notice to the Commissioners or Farmers of the reason of so doing.

C H A P. XIV.

Of Scavage, Package, Porterage, Water-Bailage, Ports, Members, Creeks, the Port of London, and places lawful to lade and unlade in.

I. Scavage, what, where payable, and to whom.

II. Who pay the same, and how regulated and governed.

III. Goods omitted in the Scavage-Table of Rates, how to pay.

IV. Of Package, how governed, and where payable.

V. Where Strangers shall pay as of old.

VI. Of Packers, Water-side Porters, what Duties Strangers are to pay for shipping out their Goods.

VII. Of the Duty of Water-Bailage.

VIII. Of Ports, Members, and Creeks, what are meant and understood by them in reference to action, lawful or unlawful.

IX. The several Ports, Members and Creeks in England and Wales.

X. Of the extent of the Port of London.

XI. Of the several Keys, Wharfs, and other places lawful for landing of Goods.

XII. What Goods are excepted which may be shipped or landed at other places.

Savage is an ancient Toll or Custom exacted by Mayors, Sheriffs, &c. of Merchant-Strangers for Wares shewed or offered to sale within their Precincts, which is prohibited by the Statute of 19 H. 7. cap. 8. in a Charter of King Henry the Second to Canterbury, it is written *Scawinga*.

The City of London still retains the Custom, of which in an old printed Book of the Customs of London it is there mentioned, and how to be disposed; of which Custom, halfen del apperteyneth to the Sheriffs, and the other halfen del to the Hostys, in whose houses the Merchants be lodged: And it is to wet that Scavage is the shew, by cause that Merchants shewen unto the Sheriffs Merchandizes of the which Customs ought to be taken oze that any there be sold, &c.

II. The Scavage that is taken consists of two parts, that which is payable by Denizens, and that which is required of Aliens.: And that all persons subject to such Duties might

22 H. 8. c. 8.

might not be imposed upon, there are Tables mentioning the particular Duties set up and approved by the Lords Chancellor, Treasurer, President, Privy-Seal, Steward, and two Justices of the *Kings-Bench* and *Common-Pleas*; and by them subscribed, or any four of them at least: The which Duties are on *Goods Inwards* and *Outwards*.

Per Order of
K. Charles I.
subscribed by
William Lord
Bishop of Lon-
don. H. Earl of
Manchester,
L.C.J. Bump-
ston, and Lord
Littleton.

III. *Note*, All Goods mentioned in the Table of *Scavage*, and not mentioned in the Table of Rates, shall pay after the Rate of one peny in the pound, according as they are expressed and valued in his Majesties Book of Rates, and all others not expressed therein, shall pay the same Rates according to the true value.

Note, That all private Baulks 8 inches square and upwards, are by the 23 Article annexed to the Book of Rates reputed Timber, and valued at 3 *d.* the Foot, 50 Foot making one Load, the value of which is 12 *s.* 6 *d.* and the Subsidy for one Load $\frac{1}{4}$ of one peny, or one half peny and half one farthing, out of which the 5 *per Cent.* is to be deducted.

IV. There is likewise another Duty called *Package*, the which is likewise set and rated in a Table, and the which is taken of all the several Commodities therein mentioned.

All Goods not mentioned in that Table, are to pay for *Package* Duties, after the rate of one penny in the Pound according as they are expressed or valued in his Majesties Books of Rates, and all others not expressed therein shall pay the same rate according to their true value.

For every Entry in the Packer's Book for writing Bills to each Entry outward, as usually they have done, 12 *d.*

V. The Strangers are to pay the labouring Porters for making up their Goods, at their own charge, as always they have done.

Strangers are likewise to pay the Water-side Porters belonging to the Package-Office, such Fees and Duties for Landing and Shipping their Goods, as they usually have done within these ten years.

VI. The Packers Water-side Porters have Tables of Duties for landing of Strangers Goods, and for the shipping out their Goods; and Goods not mentioned in the Table are to pay Portage Duties as other Goods do of like Bulk or condition therein expressed.

VII. There

VII. There is another ancient Duty called *Water-Millage*, which the City of *London* have received time out of mind, viz. for all Goods and Merchandize imported as well from any Port within the Realm to the Port of *London*, as from any part out of the Realm to the same, and so the like Duties (with some variances) for all such Goods as shall be exported from the Port of *London* to any other Port within the Realm, so likewise without: of this Duty all the Citizens and Free-men of the City are exempted; and though the same is very ancient *, and was * 5 July, 1 Job. once but small, in regard, within memory, it was looked upon as an Honour for a Merchant to be a Citizen of *London*, and so consequently freed; but now, especially since the late Wars, abundance of persons eminent both for Honours and Estates being unwilling to intangle themselves in the publick Affairs of the City, do refuse absolutely to accept of the Freedom of the same, since which there have been great Contests with those Traders; and though the Coast-Duties have been agreed to, yet the Foreign now arising to some considerable value, is highly disputed. And though Charters, Acts of Parliament, Common Councils, continued Tracts and Foot-steps of ancient Evidences and Records, are yet extant to evince and make out the most apparent Title that may be, the same nevertheless labours under the greatest difficulty amidst the divisions of its proprietors.

7 R. 2. num. 37.

1 Aug. 21 R. 2.
entered in the
City-book
called *Dun-*
thorn, fol. 96,
& 97. Repor-
tery ult. Aug.
19 H. 8. 2 Off.
3 Jac. &c.

VIII. Port, or *locus publicus*, are those places to which the Officers of the Customs are appropriated, and which contain and include all the Privileges and Guidance of all Members and Creeks thereunto allotted.

Portus qua pub-
licus non solum
mercibus exone-
randis inservit,
sed ut naves ibi

receptaculum habeant, & jure debito ac securitate fruantur Navigantes quatenus inno-
centem iter & stationem querunt. Hinc Portus & Navalia privilegio pacis publicæ gaudent.
Id. 1. Leg. 1. §. stationem D. de flum. cap. 2. Jur. Nautic. Sued. c. 1. §. 1. 4 H. 4. 20.

Members are those places where anciently a Custom-House hath been kept, and Officers or their Deputies attending, and are lawful places of Exportation or Importation.

Creeks are places where commonly Officers are or have been placed by way of prevention, not out of duty or right of attendance, and are not lawful places of Exportation or Importation without particular Licence or Sufferance from

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from

Portus est conclusus locus quo importantur merces & exportantur, l. 59. de verb. Sign. Alias statio, quod ibi tuto naues stare possint, leg. 1. §. 13. D. de Hum.

from the Port or Member under which it is placed.
IX. The several Ports and Members as now they account at the Custom-House, are,

Ports. Members. Creeks.

London.	Gravesend.
	{ Leigh.
	{ Burnham.
	{ West Mersey.
Ipswich.	{ Colchester.
	{ East Mercy.
	{ Brickley.
	{ Wrenboe.
	{ Maintree.
	{ Harwich.
	{ Woodbridge.
Yarmouth.	{ Alborough.
	{ Orford.
	{ Dumwick.
	{ Sowold.
	{ Walderwich.
	{ Lestoffe.
	{ Blackney and Cley.
	{ Wells.
	{ Burnham.
Lynn.	{ Hitcham.
	{ Cross Keys.
	{ Wisbeech.
	{ Spalding.
	{ Fosdick.
	{ Wainfleet.
	{ Numby Chappel.
	{ Thetlethorp.
	{ Saltfleet.
Boston.	

Ports.

Members.

Creeks.

Hull. ———— { Grimsby. ———— Gaint horpe.
 { Bridlington. ————
 { Scarborough. ————

New-Castle. ———— { Whitby. ————
 { Stockton. ———— Middleborough.
 { Hartlepoole. ————
 { Sunderland. ————
 { Sheilds. ————
 { Seaton delaval.
 { Blith nooke.

Berwick. ———— { Aylemouth.
 { Warnewater.
 { Holy Island.
 { East Marches, contain-
 ing the Coast of
 Northumberland, bor-
 dering on Scotland.

Carlisle. ———— { ———— { West Marches, con-
 { ———— taining the Coast
 { ———— of Cumberland, bor-
 { ———— dering on Scotland.
 { Whitehaven. ———— { Workington.
 { ———— Ravenglas.
 { ———— Milnthorpe.

Ports.

Members.

Creeks.

	Lancaster.	{ Pyte of Fowdrey. Graunge.
	Boulton.	{ Wyrewater. Preston and Ribb Water.
	Leverpool.	{ Sankey Bridge. Fradsham. South shore of the River of Mersey to the Red Stones.
Chester.		{ Hilbree. Dawpoole. Neston. Burtonhead. Baghill. Mostin.
	Aberconway.	_____
	Bewmaris.	{ Holyhead. Amlogh.
	Carnarvan.	{ Pulbelly. Barmcu:b.

Milford.

Ports.	Members.	Creeks.
	<i>Aberdovy.</i>	<i>Aberystab.</i>
<i>Milford.</i>	<i>Cardigan.</i>	<i>Newport.</i> <i>Fiscard.</i>
	<i>Pembroke.</i>	<i>Haverford West.</i> <i>Tenby.</i> <i>Carmarthen.</i> <i>Lanelthy.</i> <i>North Burrys.</i>
<i>Cardiffe.</i>	<i>Swansey.</i>	<i>South Burrys.</i> <i>Neath or Britton</i> <i>Ferry.</i> <i>Newton.</i>
		<i>Aberthaw.</i> <i>Penarth.</i> <i>Newport.</i> <i>Chepstow.</i>
<i>Glocester.</i>		<i>River Severn from</i> <i>Bridge-North to</i> <i>King-Road.</i>
<i>Bristol.</i>		<i>Pill.</i> <i>Uphill.</i>
<i>Bridgewater.</i>	<i>Minhead.</i>	

Ports.	Members.	Creeks
	Padstow. _____	
	St. Ives. _____	
	Penfance. _____	
	Helford. _____	
Plymouth. ————	Falmouth. ————	{ Penrin. St. Maures. Truro.
	Fowey. _____	
	Lowe. _____	
	_____	{ Saltaſh. Stonehouſe. Cowſland.
	Ilfracomb. _____	
	Barnſtable. ————	{ Clowelly. Appledore. Biddiford.
Exeter. ————	_____	{ Tincomb. Starcrofs. Beare and Seaton. Topſham. Pouldram. Sydmouth. Lympton. Exmouth. Aylmouth.
	Dartmouth. ————	{ Saltcomb. Brixham. Torhay. Totnes.

Ports.	Members.	Creeks.
Poole.	Lyme.	Bridport.
		Charmouth.
	Weymouth.	Portland.
		Lulworth.
Southampton.		Swanidge.
		Wareham.
		Christchurch.
		Hinington.
	Cones.	Yarmouth.
		Newport.
	Portsmouth.	Emsworth.
Chichester.	Arundel.	Pagham Point.
		Selfey.
	Shorham.	Brightbempston.
	Lewis.	New Haven.
		Seaford.
	Pemsey.	
	Hastings.	
	Rye.	Winchelsea.
		Lyd.
		Rumney.
	Hytb.	

Ports.

Members.

Creeks.

	Dover.	Deale.
		Rumsgate.
		Marget.
Sandwich.		Whitstable.
	Faversham.	
	Milton.	
	Rocheſter.	Quinborough.

Note, All the Ports and Havens in England are *infra Corpus Comit'*, and that the Court of Admiralty cannot hold Jurisdiction of any thing done in them. *Holland's Caſe*, Earl of *Exeter*, 30 H. 6. And becauſe he held Plea in the Admiralty of a thing done *infra Portum de Hull*, damages were recovered againſt him two thouſand pounds. *Vide Mich. 12 Jac. C. B. Greenway verſus Barber, Godbolt 260. 261.*

Ad Portus inſtaurationem, quia publica utilitatis gratia ſit, omnes ſubditi loci conferre operas debent, lib. 7. C. de oper. publ.

Portus intuitu fluminis quo ambitur, & veſtigialis quod ex navium ſtatione penditur, eſt publicus & hodie Regalibus accenſitur. §. 2.

Feſt. de rer. dio. l. 4. §. D. de cod. c. un. que ſunt Rega.

IX. In regard that the Port of London is of great concern in relation to the Customs, the extent and limits of the ſame Port is by the *Exchequer* ſetled, which is declared to extend and be accounted, from the Promontory or Point called *North-Foreland* in the Iſle of *Thanet*, and from thence *Northward* in a ſuppoſed line to the oppoſite Promontory or Point called the *Naſe*, beyond the *Gunſleet* upon the Coaſt of *Effex*, and ſo continued Weſtward through the River of *Thames*, and the ſeveral Channels, Streams and Rivers falling into it, to *London-Bridge*, ſave the uſual and known right, liberty and privilege to the Ports of *Sandwich* and *Iſpwich*, and either of them, and the known Members thereof, and of the Cuſtomers, Comptrollers, Searchers, and other Deputies of and within the ſaid Ports of *Sandwich* and *Iſpwich*, and the ſeveral Creeks, Harbours

and

and Havens to them or either of them respectively belonging within the Counties of *Kent* or *Essex*.

X. And in regard that when Ships did come up to the Port of *London*, there used to be very great Frauds committed by a promiscuous kind of shipping and landing of Goods and Merchandizes at several blind or unknown Wharfs and Keys, by reason of which his Majesty was often defeated of his Customs, it was provided that a Commission might issue forth out of the *Exchequer* to ascertain all such Wharfs, Keys, or other places as his Majesty by virtue of such Commission should appoint, in pursuance of which his Majesty hath been pleased to allow to be lawful Keys, Wharfs, and other places for the lading or landing of Goods,

Brewers Key.

Chesters Key.

Wooll Dock.

* *Custom-House Key.*

{ * Some Stairs on the West side thereof are declared not to be a place for shipping or landing of Goods.

Porters Key.

Bear Key.

† *Sabbs Dock.*

{ † Excluding the Stairs there, which are declared no lawful place for shipping, or landing of Goods or Merchandize.

Wiggon's Key.

Youngs Key.

Ralphs Key.

* *Dice Key.*

{ * The Stairs there declared unlawful for shipping or landing of Goods or Merchandize.

Smart Key.

† *Somers Key.*

{ † The Stairs there declared no lawful place for shipping and landing of Goods and Merchandizes.

Lyon Key.

Busolph Wharfe.

Hamons Key.

* *Gaunts Key.*

{ * The Stairs on the East declared unlawful for shipping or landing of any Goods, &c.

Cocks Key.

{ One other place betwixt *Cocks Key* and *Fresh Wharfe*, called part of *Fresh Wharfe*, the Stairs are declared to be unlawful for shipping or landing of any Goods, &c.

*Fresh Wharfe.**Billingsgate.*

{ To be a common open place for the landing or bringing in of Fish, Salt, Victuals, or Fuel of all sorts, and all Native Materials for Building, and for Fruit (all manner of Grocery excepted,) and for carrying out of the same, and for no other Wares or Merchandize.

Bridge-House in Southwark.

{ May be allowed a place convenient for landing of any kind of Corn bought or provided for Provision or Victualling of the City of *London*, and not upon any private or particular persons account, and for no other Goods or Merchandize.

XI. It may be lawful for any person to ship or lade into any Ship or Vessel on the River of *Thames* bound over Seas, Horses, Coals, Beer, ordinary Stones for Building. Fish taken by any of his Majesties Subjects, Corn or Grain, the Duties being paid, and Cocquets and other lawful Warrant duly passed for the same.

So likewise Deal-boards, Balks, and all sorts of Masts and Great Timber may be unshipt and laid on Land at any place between *Lyme-house* and *Westminster*, the Owner first paying or compounding for the Customs, and declaring at what place they will land them before he unships them and upon Licence had and in the presence of an Officer they may unlade them ; otherwise they incurr a forfeiture.

CHAP. XV.

Provisions and Allowances made notwithstanding the several Clauses in the Acts for the Customs.

- I. Custom to be paid for no more than is landed; and when Bulk shall be broken.
- II. Of Goods Imported and Exported, what of the Customs shall be repaid back, and by whom; and of the things requisite in the same.
- III. Of Agreement or Contrasts made or to be made for the importing and exporting by way of Composition ratified.
- IV. What Allowances to be made to the Exporters of Wines.
- V. Of Exporting of Spanish Wool; where the same may be done.
- VI. Of Currans Exported, what Allowances shall be made, and to whom, as well to Denizens as Foreigners.
- VII. Goods imported not finding Market after a year; Wine exported discharged of Custom.
- VIII. What Allowances are to be made for Leakage.
- IX. What shall be accounted Leakage.
- X. Wines proving unmerchantable, what allowances to be made.
- XI. Tabacoes receiving detriment or damage in the Importation, what allowances to be made.
- XII. Strangers paying double Subsidy, where they shall pay double Custom.
- XIII. Of times and places lawful to unlade, and Officers duties then attendant to be present.
- XIV. York, New-Castle, and Hull men where Custom-free, and for what.
- XV. Exeter and other Western men, what free Subsidies shall be allowed in.
- XVI. Woollen, whether new or old, what allowances shall be made in Custom or Subsidy.
- XVII. Allowances of s. in the Hundred for all other Goods.
- XVIII. The Customers and other Officers Duties in reference to attend their several Duties in the Customs.
- XIX. Of Officers their Duties, and the punishments where made on complaint.
- XX. The several Duties of London how preserved.
- XXI. The like for other Cities for those Duties granted or taken for publick good uses.
- XXII. Where Ships may be visited and the Officers duty relating to the same.
- XXIII. Timber to be rated, and in what manner must pay.
- XXIV. Prevention in Extortion of Customers and Officers, and on what pains and penalties.
- XXV. Where Fees for Cocquets and Certificates shall be paid all together, and where he shall detain his own Cocquet till the Vessel has broke ground.
- XXVI. Where the Officers and Customers shall allow and make good to the Merchants the Algier Duty and all other allowances, and no other Imposition or Duty required by the Book of Rates, shall be required or paid.

XXVII. If

XXVII. If Goods shall happen to be taken by Enemies or Pirates, or wreck'd, and what allowances shall be paid.

XXVIII. Ships of War and other privileged Vessels subject to search.

XXIX. Of Allowances to be made, and of shipping out lesser quantities than are contained in the Certificate, what operation the same have.

Vide Cap. 14.
What are law-
ful places of
landing.

EVERY Merchant shall have free liberty to break Bulk in any Port allowed by Law, and to pay Custom and Subsidy for no more than he shall enter and land; Provided that the Master or Purser of every such Ship shall first make declaration upon Oath before any two Principal Officers of the Port of the true contents of his Ships lading, and shall likewise after declare upon his Oath, before the *Customer, Collector, Comptroller, Surveyor*, or any two of them at the next Port of this Kingdom, where his Ship shall arrive, the Quantity and Quality of the Goods landed at the other Port where Bulk was first broken, and to whom they did belong.

Coke 12. part,
fol. 17, 18.

A Merchant brought eighty Tun of Bay-Salt by Sea to a Port in *England*, and out of that Ship sold twenty Tun, and discharged the same into another Ship then riding at the same Port, but the twenty Tun were never actually put on shore, and for the rest, being sixty Tun, the Master agreed for the *Customs* and put them on land; and although that that twenty Tun was always water-born, and never were put on shore, yet adjudged they ought to pay; the reason was, for the discharging them out of the Ship, amounts as much as to the laying them on Land, the same being done in Port; for otherwise the King would merely be defrauded. But if a Ship is carried in by storm, and to preserve the Vessel part is landed before the Duty paid, yet this will not subject the same to a forfeiture.

Fogassæ's Case.
Plowden. Com.
fol. 9.

II. All Foreign Goods and Merchandizes (except Wines, Currants, and wrought Silks) first Imported, shall be again Exported by any *English* Merchant within twelve Months, and such Merchant or Merchants as shall Export any such Foreign Goods or Merchandizes (except as before is excepted) shall have allowance and be repaid by the Officer which received the same, the one moiety of the Subsidy which was paid at the first importation of such Goods or Merchandizes, or any part thereof, so as due proof be first made by Certificate from the Officers of the

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due Entry and Payment of the Custom and Subsidy of all such Foreign Goods and Merchandizes inwards with the Oath of the Merchants importing the same, affirming the truth thereof, and the name of his Majesties Searcher, or Under-searcher in the Port of *London*, and of the Searcher of any other the Out-Ports, testifying the shipping thereof to be Exported; after all which duly performed in manner before expressed, the moiety of the Subsidy first paid inwards, shall without any delay or reward be repaid unto such Merchant or Merchants who do export such Goods and Merchandizes, within one month after demand thereof, as also the whole additional Duty of *Silk, Linen, and Tabaco*, as before is directed.

If the Officer shall refuse to pay, (admitting there was no Relief had by way of complaint) whether the Merchant Exporter may not bring an Action against him upon the Debt created in Law, as he that hath a Tally may do. I H. 7.

* *Hobart* 279.
Roils Abridg.

III. And if there be any Agreement now in force, which was formerly made by the late Commissioners of the Customs and Subsidies, with the Merchants Strangers or their Factors, or shall hereafter be made by any Commissioners or Farmers of the Customs and Subsidies, or any other power (except by consent of Parliament) with any Merchant or Merchants Strangers or Factors for any Foreign Goods and Merchandizes, to be brought into the Port of *London*, or any other Port or Haven of this Kingdom of *England*, or Principality of *Wales*, and to be Exported again by way of Composition; all other Merchants being his Majesties Subjects shall be admitted into the same Composition, and not be excluded from any other privilege whatsoever granted to the stranger by any private agreement or composition, under the same condition and with the same restriction as shall be made with the Merchant Stranger. 599.

IV. Every Merchant as well *English* as Stranger that shall ship and export any kind of Wines which formerly have paid all the Duties of Tunnage inwards, shall have paid and allowed unto them all the Duties of Tunnage paid inward, except to the *Englishman* 20 s. per Tun, and the Stranger 25 s. per Tun; upon due proof of the due Entry and payment of Tunnage inwards and of the shipping thereof

thereof to be Exported to be made as above.

12 Car. 2 c. 32.
14 Car. 2 c. 18.

V. If any Merchant, Denizen or Stranger shall Export any *Spanish* or *Foreign Wooll*, he shall have liberty so to do with this further condition, That such *Spanish* or other *Foreign Wools* whatsoever be not Exported in any other Ship or Vessel whatsoever, with intent to be arrived beyond the Seas out of the Kingdom of *England* and Dominion of *Wales*, than only in *English* Shipping, upon pain of Confiscation.

VI. Every Merchant, as well *English* as Stranger, which shall ship or Export any Currans which formerly were duly entred, and paid the Subsidy and Custom inwards, shall have allowed and repaid unto them respectively all the Custom and Subsidy paid inwards for the same, except 1 s. 6 d. for every Hundred weight to the *English*, and 1 s. 8 d. and one half penny for every Hundred weight to the Stranger, upon due proof of the due Entry and payment of the Custom and Subsidy thereof inwards, and of the shipping thereof to be Exported to be made as in the second Article.

VII. If any Merchant having duly paid all Duties inwards for Foreign Goods, and in regard of bad sales shall be enforced to keep the same or any part thereof in his hands after the space of a year shall be elapsed; in this case he or any other person is to be permitted to ship the same out for parts beyond the Seas, if they think fit, without payment for any Subsidy for the same outwards, upon due proof that the same was duly entred, and Subsidy paid inward.

VIII. Every Merchant bringing in any sort of Wines into this Kingdom by way of Merchandize, and shall make due Entries of the same in the Custom-house, shall be allowed 12 per Cent. for Leakage.

IX. Every Hogshead of Wine which shall be run out and not full seven inches, shall be accounted for outs, and the Merchant to pay no Subsidy for the same.

Boyce vers^t Cole
sen & Cole jun.
Hill, 27 Car. 2.
in B. R.

And by some is conceived that no Freight shall be paid for the same, but the Merchant may sling them up to the Master for Freight, but that should seem hard, for *non constat* any fault in the Master, but the same may be in the Cask, or in the ill stowing (the Master by custom having no charge of the stowing of Wines, especially *French*, but the

the same belongs to certain Officers beyond Seas from whence thy are imported) besides the *Goods*, be they empty or full, take up Tunnage in his Ship, and should all the Wines on ship-board have the same misfortune, it would seem hard; however, it is pity opinion in this case should amount to a laudable custom.

X. If any Wines shall prove corrupt and unmerchandise, and fit for nothing but to distil into hot Waters, or to make Vinegar, then every Owner of such Wines shall be abated in the Subsidy according to such his damages in those Wines by the discretion of the Collectors of the Customs and one of the Principal Officers.

XI. If any *Tabacco* or other *Goods* or *Merchandise* brought into this Kingdom shall receive any damage by salt water or otherwise, so that the Owner thereof shall be prejudiced in the sale of such Goods, the principal Officers of the Custom-house, or any two of them, whereof the Collector for the time being to be one, shall have power to chuse two indifferent Merchants experienced in the values of such Goods, who upon visiting of such Goods, shall certify and declare upon their Corporal Oaths first administred by the said Officers, what damage such Goods have received, and are lessened in their true value; and according to such damage in relation to the Rates set on them in the Book of Values, the Officers are to make a proportionable abatement unto the Merchant or Owner of the Subsidy due for the same.

XII. All Merchants Strangers who according to the rates and values set in the general Book of Values and Rates, and do pay double Subsidy for Lead, Tin, Woollen Cloth, shall also pay double Custom for Native Manufactures of *Wooll*; and the said Strangers are to pay for all other Goods as well inwards as outwards, rated to pay the Subsidy of Poundage, three pence in the pound, or any other Duty payable by *Charta Mercatoria*, besides the Subsidy.

XIII. That the Merchants Trading into the Port of *London* have free liberty to lade and unlade their Goods at any lawful Keys and places of shipping * and lading of Goods between the *Tower of London* and *London Bridge*, and between Sun-rising and Sun-setting from the Tenth day of *September* to the Tenth day of *March*; and between the

There is a Book at the Custom house, in which there is a general value set on all Goods, among which *Tabaco* is there valued.

Nor can such Merchants Strangers land their Goods before they have agreed for the Customs, notwithstanding *Charta Mercatoria*.

* *Vide lib. 3. cap. 14. §. 10.*

the hours of six of the Clock in the Morning, and six of the Clock in the Evening, from the Tenth day of *March* to the Tenth of *September*, giving notice thereof to the respective Officers appointed to attend the lading and unlading of Goods; and such Officer as shall refuse upon due calling to be present, he shall forfeit for every default $\frac{1}{2}$ the one moiety to the King, the other to the party aggrieved, he suing for the same.

XIV. The Merchants of *Tork*, *Kingston upon Hall*, and *New-Castle upon Tyne*, and the Members thereof, shall be allowed free Custom and Subsidy two of the *Northern* Clothes and Kerfies in ten to be shipped in those Ports in the name of *Double Wrappers*, as formerly has been there allowed them.

XV. The Merchants of *Exeter* and other Western parts shall be allowed free of Subsidies one *Perpetanae* in Ten for a *Wrapper*, and three *Devons Dozens* in Twenty for *Wrappers*, the same to be shipped out of the Ports of *Exeter*, *Plymouth*, *Dartmouth*, *Barnstable*, *Lyme Regis*, or the Members thereof.

Note, That all these several allowances are not by Act of Parliament, but purely his Majesties gracious and voluntary gift and benignity towards the encouraging the Merchants and Trade.

XVI. All Merchants transporting any sort of *Woollen*, whether new or old Drapery, as also all *Bayes* and *Cottons*, shall be allowed one in ten for a *Wrapper* free of Custom and Subsidy.

XVII. Every Merchant shall be allowed upon all other Goods and Merchandize appointed to pay to any the Subsidy of Poundage according to the Rate in the Book of Values, to be imported, $\frac{1}{2}$ in the Hundred of all the said Subsidies of Poundage so appointed to be paid.

XVIII. The Officers who sit above in the Custom-house of the Port of *London*, shall attend the service of their several places from nine to twelve of the Forenoon, and one Officer or one able Clerk shall attend with the Book in the Afternoon during such time as the Officers are appointed to wait at the Waters side, for the better deciding of all Controversies that may happen concerning Merchants Warrants, all other the Officers of the Out-Ports shall attend every day in the Custom-house of every respective Port for dispatch of Merchants and Ships, between the hours of nine and twelve; and two and four in the Afternoon.

XIX. Every Merchant making an Entry of Goods either inwards or outwards, shall be dispatched in such order as he cometh; and if any Officer or his Clerk, shall either for favour or reward put any Merchant or his Servant duly attending and making his Entries as aforesaid, to draw any other Reward or Gratuity from him than is limited in the Act of *Tunnage and Poundage*, and the general Book of Values, if the Master Officer be found faulty herein, he shall upon complaint to the Chief Officers of the Custom-house be strictly admonished of his Duty; but if the Clerk be found faulty therein, he shall upon complaint to the said chief Officers be presently discharged of his Service, and not permitted to sit any more in the Custom-house.

XX. The Lord Mayor, Commonalty and Citizens of the City of *London*, their Officers or Deputies for and touching Offices of *Package, Scavage, Baleage or Portage* of any Goods or Merchandize of Aliens, or their Sons born within this Kingdom or unfreemen, Imported or Exported into or out of the City of *London* or the Liberties or Ports thereof unto or from the parts beyond the Seas, for or concerning the receiving or taking of any Fee or Rates heretofore usually taken, for or in respect of the said Offices, or any of them might and may receive and take the same, any thing in the ACT of *Tunnage and Poundage*, or any other Act or thing to the contrary notwithstanding.

XXI. All ancient Duties heretofore lawfully taken by any City or Town Corporate their Farmers, Deputies or Officers, under the name of Town-Custom, or the like, for the maintenance of Bridges, Keys, Harbours, Wharfs, or the like, shall and may be received and enjoyed as formerly, any thing in the said Act, or any other Act to the contrary in any wise *non obstante*.

XXII. The Under-Searcher or other Officers of *Gravesend* have power to visit and search any Ship outward bound, but shall not without just and reasonable cause detain any Ship under colour of searching the Goods therein laden above three Tides after her arrival at *Gravesend*, under pain of loss of their Office, and rendring damage to the Merchant and Owner of the Ship, and the Searcher or Officer of the Custom-house in any of the out-Ports having power

power to search and visit any Ship outward bound, shall not without just and reasonable cause detain such Ship under colour of searching the Goods therein laden above one Tide after the said Ship is fully laden and ready to set sail, under pain of loss of the Office of such offender, and rendring damage to the Merchant and Owner of the Ship.

XXIII. All Timber in balks which shall be of 8 inches square or upwards that shall be imported or brought from any part beyond the Seas into the Realm of *England*, Dominion of *Wales*, Port and Town of *Berwick*, or any of them, shall be rated according to the measure of Timber the foot square 3 *d.* for the value thereof and according to that rate shall pay for Subsidy 12 *d.* in the pound according to Poundage; and all under 8 inches square, and above 5 inches square, shall pay for Subsidy according to the rates mentioned in the Book of Rates for middle Balks, and all of 5 inches square or under shall pay according to the rate of small Balks.

XXIV. For avoiding of all oppressions by any the Officers of the Customs in any Port of this Kingdom, in exacting unreasonable Fees from the Merchant by reason of any Entries or otherwise touching the shipping or unshipping of any Goods, Wares or Merchandize, it is ordered, That no Officer, Clerk or other belonging to any Custom-house whatsoever, shall exact, require or receive any other or greater Fees of any Merchant or other whatsoever, than such as are or shall be established by the Commons in Parliament assembled; and if any Officer or other offend contrary to this Order, he shall forfeit his office and place, and be for ever after incapable of any office in the Custom-house.

XXV. All Fees appointed to be paid unto the *Customer*, *Comptroller*, *Surveyor*, or *Surveyor General* in the Port of *London*, for any Cocquets or Certificate outwards, shall be paid altogether in one sum to that Officer from whom the Merchant is to have his Cocquet or Certificate above in the Custom-house; and after the Merchant hath duly paid his Custom and Subsidy and other Duties above in the Custom-house, as is appointed above by the Book of Rates, he is to be master of and keep his own Cocquet or Certificate until he shall ship out his Goods so entred whenas

whenas he is to deliver the same to the *Head-Searcher*; or his Majesties *Under-Searcher* in the *Port* of *London* or other *Ports*, together with the mark and number of his Goods.

XXVI. The *Officers* of the Custom-house for the time being, shall allow and make unto all persons all such *Moneys* as are, or shall be due unto them for the half *Subsidy*, and also the *Algier Duty* of Foreign Goods formerly exported now due and unpaid.

The Duties and Sums of Money appointed to be paid by the Act of *Tunnage* and *Poundage* passed this Parliament, and by the Book of Rates therein mentioned, and no other shall be paid to his Majesties *Officers* during the continuance of the said Act upon Goods imported and exported, by Law, Statute, or Usage to the contrary notwithstanding. Nevertheless the duty of *Prizage* and *Butlerage*, and the duty of 12 *d.* of every Chaldron of Sea-Coal exported from *Newcastle* upon *Tyne* to any other Port or Ports of this Realm shall be continued.

XXVII. If any Merchant Denizen born shall happen to have his Goods and Merchandize taken by Enemies or Pirates at Sea, or perished in any Ship or Ships, the Duties being either paid or agreed for, upon due proof thereof, may ship out of the same Port the like quantity as shall amount unto the Custom without paying of any thing for the same. 27 Ed. 3. cap. 13. 12 Car. 2. cap. 4.

If the Importer shall pay ready Money, he shall be allowed 10 per Cent. for so much as he shall pay down.

XXVIII. Ships of War may be entred and searched for prohibited and unaccustomed Goods, and to bring them ashore to the King's Ware-houses, and the Commissioners or Head-Officers may leave aboard Officers to look after them, that none be unladen or imbezelled, on pain of forfeiture of 100 *l.* And if Goods are concealed on ship-board after such time as the Ship is cleared, to forfeit 100 *l.* and then any with a Writ of Assistance out of the Court of *Exchequer* to go in the day-time to any place, and enter and seize. 14 Car. 2. c. 11.

Goods conveyed secretly into Ships, and carried away without paying the Subsidy and Duties, the Owners and Proprietors forfeit the double value, except Coals, which only forfeit the double Custom and Duty.

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XXIX. There are allowances to be given Merchants for defective and damaged Goods of 5 *per Cent.* on all Goods imported, and 12 *per Cent.* on all Wines to be allowed upon Debentures; but if they shall ship out less than is in the Certificate, then the Goods therein mentioned, or the value thereof shall be forfeited, and the Owner or Merchant shall lose the benefit of receiving back any of the Subsidy: and Goods shipped out are not to be laded again in *England*, on pain of forfeiture of those Goods.

All Goods coming out of, or carried into *Scotland* by Land, shall pass through *Berwick* or *Carlisle*, and pay Custom as others, on pain of forfeiture.

And although that by this Act there are many allowances to be made, especially Merchants-Denizens, yet the Parliament have ever been so careful as to bound the same, that is, it shall be such who traffick in Ships; (which are indeed the Bulwark of this Isle) and therefore if such Merchandize shall be transported out in any Galley or Carack, they are obliged to pay all manner of Customs, and all manner of Subsidies, as any Alien; but in regard that Herring and Fish are, and have been accounted one of the principal Commodities, and generally finds a vent or Market in those Kingdoms and Countries that usually employ such sort of Vessels, those Commodities may be transported in them as well as ships from any Port or Harbour within this Realm, without paying any Subsidy or Poudage for the same; but then such Fish must be taken by the Natives of the Kingdom, and transported by them, otherwise to pay as Aliens.

And whereas all manner of *Woollen* Clothes, as well white as coloured, unrowed, unbarbed, and unthorn, and not fully dressed, are prohibited by Law to be transported. His Majesty was graciously pleased to grant * unto *Frances* Countess of *Portland*, as well for her Alliance in Blood, as also for the many Crosses and Calamities which she hath suffered by the loss and death of her nearest Relations, in his Majesty and his Royal Fathers Service, full power for one and thirty years, to licence the transporting of such Goods, *non obstante* such prohibitory Laws, the which is now put in Execution by Agreement, and Composition with her Deputies at the Custom-house.

* Per Letters
Patents bearing
Date
24 of Feb.
27 Car. 2.

C H A P. XVI.

Of the Right of Passage, of imposing on the
Persons and Goods of Strangers for
passage through the Seas.

I. Of the Right of harmless Utility
excepted tacitly in the primitive do-
minion of things.

II. Where Passage ought to be open,
and where the same might be im-
plicitly provided for in the first
institution of Property, and under
what Cautions.

III. Of the same right in reference to

Goods and Merchandize:

IV. If Passage admitted, whether
Tribute or Toll may be imposed.

V. Where Imposition may lawfully be
laid, and for what causes; and of
the Kings Prerogative in that
Point.

VI. Whether lawful to stay in others
Country, and to build for a season.

HAVING in the foregoing three Chapters observed
somewhat of Customs and Impositions laid *de facto*
within the Realm, and that by Acts of Parliament, or
the consent of the three Estates, it may not seem amiss to
inquire what Imposition the King of his Prerogative may
impose on Strangers and their Goods passing through his
Territories and Seas; and in that to inquire of the same
in reference to Persons and Goods.

Besides the right of necessity which seems to be except-
ed in the first Institution of Dominion, there is another
Relique of old Communion, namely, the Right of harm-
less Utility: For why should not one (saith Cicero) when
without his own detriment he may communicate to another
in those things that are profitable to the Receiver, and to the
Giver not chargeable. Therefore Seneca saith, It cannot
be called a benefit to give leave to another to light his Fire by
yours. We read in Plutarch, it is not lawful to spoil our
Victuals when we have more than enough, nor to stop,
nor hide a Fountain when we have drunk our fill; nor to
abolish the Way-marks either by Sea or Land which have
been useful to us: So a River as a River is proper to that
Prince, or that Lord, or that People within whose Domi-
nion or Royalty it runs, and they may make a Mill on it,
(unless it be common as a High-way) and may take what

Cic. de Offic. 1.

*Sen. de Benef.
4. Symp. 7.*

*Leg. quadam D.
de rer. divis.*

Fish the River yields, but the same River as a running water remained common as to drinking or drawing of it, notwithstanding as to the Fishing, and the like, it may be peculiar.

Bald. 3. conf.
293.

* Lib. 1. cap. 1.
† §. 3. & 4.
Serv. ad 7.
En. littusq;
rogamus inno-
cium, cujus
vindictio, ait,
nulli possit no-
cere.

Plutarch re-
lates, That Cy-
mon going to
aid the Lace-
demonians, led
his Army thro-
rough Corinth,
being repre-
hended by the
Corinthians for
not asking
leave of the
City: Nam &
qui fores alie-
nas pulsas, non
intrat nisi do-
mini permissu:

ac vos, inquit, Cleoneorum & Megarensium fores non pulsastis sed per fregistis, consentes omnia patere debere plus valentibus. However passage is and must be requested; but in lieu of that, the striking of the Flag, and lowering the Top sail is in token of that Right due to his Majesty in the British Seas. * Vide lib. 1. cap. 4. Vide Mr. Selden Mare Clausum.

III. Nor is Passage only due to persons, but to Merchandize also; for no man hath Right † wilfully to obstruct the way of Commerce to any Nation with any other that is remote, because the permission of Trade is for the interest of Nations and those of Countries may.

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of humane Society, and is not discommodious to any one, and to that purpose *Philo* speaks: *On the Sea all Ships of Philo in Legat. burden safely pass according to that Right of Commerce which Cajum.* is between all Nations arising from the desire of natural Society, while they supply one another mutually with what the one wanteth, and the other can spare; for envy hath never invaded either the whole World, or the greater parts thereof. And *Plutarch* speaking thus of the Sea: *This Element hath made our life sociable and perfect, that otherwise would be wild and without correspondence; it supplies our wants with mutual aids, and by exchange of things needful, it procures fellowship and friendship.* And the Wisdom of God is highly to be admired, who hath not granted all things to every Land, but hath distributed his Gifts to several Countries, that men having need of one another, might maintain Society for their common good; therefore hath he endowed Man with knowledge and understanding to invent and build Ships, to govern and guide them by those Lamps of Heaven and other Instruments of his Divine Wisdom, enabling thereby the Merchant to convey to all what any place affords: according to that of the Poet,

*What Nature any Land denied,
By Navigation is supplied.*

visissim, commode acciperet res apud illum abundantes; ac sic exiguum tenens terræ partem, ut tanquam si teneret universam, frueretur eis quæ orbis sunt bonis. Licet itaque tunc tanquam in communi mensa convivarum unicuique ea quæ sibi opposita dare alteri longius accumbenti, æ contra quæ apud ipsum sunt accipere manu tantum extenta.

But as the Sea is free and open for Traders, yet nevertheless the Passengers are subject to such Restrictions, Laws and Ordinances as those Sovereign Princes shall make of force in those places where they have an accession of Property or Sovereignty.

IV. But admitting that such free Passage may be granted, as above, whether Tribute may be imposed by him that rules the Land, upon Merchandize passing by Land or by River, or by part of the Sea, which may be called an Accession of the Land, (that is, the place through which they pass, is as much under the absolute Jurisdiction of the Prince, as the very Land it self) certainly whatsoever Burdens have no relation to the Merchandize, no equity

Quomodo autem satis digne quis explicet facilitatem ad mutua Commercium nobis datam? Ne enim itineris longitudo impedimentum aliorum ad alios commeantibus adferret, breviorẽ viam, mare scilicet, ubique terrarum disposuit Deus, ad mundum tanquam unam domum communiter inhabitantes crebro nos invicem inviserimus; Et apud se nata quisque alteri communicans

Vide Strabo,
lib. 2. & lib.
16.

suffers the same to be imposed on the same; neither can Poll-money put on the Inhabitants to sustain the charge of the Common-wealth, be exacted of Passengers.

* 13 H. 4. fol.
14.

† *Lib. 5. fol.*
63. Case of
the Chamber-
lain of London.

Vide the Plea
of the Vene-
tian Lawyers
at the end of
Mr. Selden's
Maye Clausum.

V. Nevertheless, if either to secure the Passengers Goods and Vessels from Pirates and others, or for the erecting of Beacons, Light-houses, and other Sea-marks, and such like, * there indeed some compensation may be laid upon the Commodities or Ships passing through, so that the measure of the cause be not exceeded; or as my Lord Coke observes in the case of the Halage-money, † it be reasonable; for upon that depends the justness of Tributes and Toll: And upon those reasons the *Venetian* in the *Adriatick*, the King of *Denmark* in the *Baltick* Sea does demand the same; and the King of *England* may do the like in the *Chambers* of his Empire, and that by his Prerogative; for the same is not so much compulsory to any to pay, but to them that will take benefit of such accommodation.

Les Comons priaient que Ion le Roy les Progenitors do long temps haut estre Seigneur de Mer, & ore est venus que le Roy Seigneur des Coſts de ambideux parties del Mer, & par ceo priaient le Roy de imposer un imposition sur Estrangers passant purmy la Mer.

Perez lib. 1. de
Jure Fiſci,
cap. 1. num. 22.

Strabo relates, That the *Corinthians* even from the most ancient of times received Tribute of the Commodities, which to avoid the compassing of *Malta*, were carried by Land from Sea to Sea. So the *Romans* received a price for the passage of the *Rhyne*. But this Right of imposing on Ships and Goods passing through some Territories, is found cruel, especially when they must pass through the Territories of a powerful and fierce People, then it is heavy to the Merchant to compound, for it's often done on hard and grievous terms.

* *Servius ad*
eum loc.

† *Plutarch Pe-*
ricle.

VI. Again, to stay some time for health sake, or for any other just cause, ought also to be permitted to Passengers, for this too is among the innoxious utility; wherefore *Illoneus* in *Virgil**, when the *Trojans* were prohibited to stay on the shore of *Africk*, is bold to invoke the Gods as Judges: and the complaint of the *Megarenſes* against the *Athenians*, who drove them from their Havens † against common Right, was approved by the *Greeks*; so that the *Lacedemonians* esteemed no cause to create a War more just: hence it is, that at this day it is held by all Lawyers, That

That it is lawful (either in cases of Wreck, or any other exigency upon such landing) for Passengers to build a Cottage or Hut on the shore to shelter them for a season, though we grant the shore to be possess'd by the Inhabitants: 'Tis true, *Pomponius* does think there ought to be the Prætor's Decree; but certainly that extends only to those Passengers that, being expuls'd their own Countries, desire perpetual habitation, and a subjection to the Government of the place where they desire to dwell.

Occupantis enim est possessio litoris, unde ostenduntur crudeliter qui etiam à communibus prohibeant.

The End of the Second Book.

K k 4

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BOOK III.

CHAP. I.

Of Freedom, Bondage, Slavery, Exile, and Abjuration.

I. Of Freedom by the Law of Nature, and of Bondage, Slavery, or Captivity introduced by the Law of Nations.

II. Of the Actions that Subject Man to Bondage.

III. Of the Dominion over Slaves Bond-men and Captives.

IV. Of the Cause, or Reason of such Dominion.

V. That this Right or Dominion was not a Law universal.

VI. Of Bondage or Slavery, where discontinued by the Christians and

Mahometans.

VII. Of a Servitude at this day, standing with the Laws of a Christian Commonwealth.

VIII. Of Manumission and Freedom by the Hebrew and Roman Law, and by the Laws of England.

IX. Of Disfranchising the several ways.

X. Of Abjuration and Exile, and what operation it hath.

XI. Of Freedom in Cities and Corporations, in reference to Merchants, Traders and Foreigners.

IN the primitive state of Nature, no men were Servants; yet it is not repugnant to natural Justice, that by the Fact of man, that is, by Covenant or Transgression, servitude should come in; therefore servitude is brought in by the Laws of Nations.

II. Hence it is, That those that will yield up their persons, or promise servitude, are accounted Slaves; so likewise all that are taken in Publick War, and brought within the Guards of their Conquerors; nor is transgression necessary, but the Lot of all is equal after the War is begun, even those whose ill fortune subjected them to be deprehended within the Enemies bounds; nor are they servants only themselves, but all their posterity for ever.

III. The Priviledges of this Right or Dominion are infinite; since there is no suffering which may not be imposed on

hominum. Apud omnes peraq; gentes, ait Caius, animadvertere possumus dominis in servos quia necisq; potestatem fuisse. Co. Instit. fol. 116. b. l. 1. D. de his qui sui sunt juria.

L. libert. §. 1. D. de statu hominum. Fium etiam servi liberi homines captivitate de jure gentium. Bracton l. 1. c. 6.

Littleton §. 175. l. Postlimi §. 1. D. de Captiv.

L. & servorum §. 1. D. de statu servos

such,

such, nor work which may not every way be extorted from them : So that even the Cruelty of Masters became almost unpunished, till the Municipal Laws of Countries set bounds to their rigour and power.

Nor are the persons become theirs only that have the power of them, but also all that they have ; for such unhappy persons can have nothing of their own.

Leg. Cornel. ff. de Testam. & Leg. Cornel. ff. de vulg. substit.

Hence it was, That that excellent Law in favour of such, was introduced by the Romans, called *Lex Cornelia*, which was when a Captive, *intra præsidia hostium*, dyed in his Captivity ; if he had made a Will, before his being taken Captive ; yet such a Captive should in favour of such Will, and for the upholding of the same, be feigned to be dead, and *in puncto temporis*, immediately before such his being taken Captive ; and so by that Legal Fiction of death, his Will became firm and valid, as if he had really dyed without ever being taken by the Enemy. So likewise if one had been made a Slave ; yet if he had returned out of his Captivity, that for the preservation of his Right and Propriety, he was feigned as if he had never been absent, and was immediately reintegrated into his pristine state and condition.

In jure Postliminii Leg. retor. & l. in bello §. 1. & l. bon. ff. de Capt. & §. 4. D. quibus mod. jus patr. solvit.

And Fortescue conceives, it began ab homine, & pro vita introducta est servitus, E. sed libertas à Deo hominis indita naturæ, quare ipsa ab homine sublata semper redire gliscit, ut faciat omne quo

IV. Now all these Priviledges and Immunities were introduced by the *Laws of Nations*, for no other reason, but that their Captors, tempted by so many Immunities, might willingly abstain from that cruel rigour of slaying their Prisoners.

Hence it is, That the Captors Dominion is extended to the Children ; for should such use their highest Right, they would not be born ; but Children that are born before that calamity, and were never taken Prisoners, are freed from that unhappy state.

libertate naturali privatur, cap. 42.

V. Though this Dominion or Right was generally acquired in most Nations, yet was not the same an universal Law ; for amongst the *Fewes*, refuge was granted to Servants who fell into that calamity by no fault of their own. And the state of *Christendom* at this day is apparent, That Prisoners taken in War do not become perfect slaves, as of old, but only remain in the custody of the Captor, till Ransoms are paid, whose valuations are generally at the pleasure

pleasure of the Conqueror; yet persons of Eminent Quality, as *Generals*, and the like, such persons, * if taken by a common Souldier, yet he has no advantage by the same; for such a Captive is become Prisoner immediately to that Prince or State under whom the Captor served: But if it be the lot of an *inferiour Soldier* to become a Prisoner of War, he is then become absolutely the Captors to dispose of; but he wanting those necessities in the Field for himself, which he ought to provide for his Prisoner, commonly waves that interest, and generally yields him up as a Prisoner of War to be disposed of by that Prince or State under whom he serves.

* Artic. of War
Anno 1673.
for his Majesties Forces,
Artic. 24.

Bart. in l. nam.
& serv. D. de
rebus gestis.

VI. Slavery in *Christendom* is now become obsolete; and in these latter Ages the minds of Princes and States having as it were universally agreed to esteem the words, *Slave*, *Bondman*, or *Villain*, barbarous, and not to be used; and that such as are taken in War between Christian Princes, should not become Servants, nor be sold, or forced to work, or otherwise subjected to such servile things, but remain till an exchange of Prisoners happen, or a Ransom paid, as afore: Nay, the very *Turks* and *Mahometans* at this day generally observe this among themselves, not to make Slaves of those of the *Mahometan Religion*, though taken in War; and that which is most to be admired, a Christian fallen into that miserable state, renouncing his Religion, and becoming a *Mahometan*, immediately upon his Circumcision obtains his Freedom with a recompence. The Cruelty of those Infidels to those unhappy persons, together with the reward of renouncing, hath given cause to many a brave person to become *Renegado*; the which being considered by the Parliament of *England*, they made a † provision for such miserable persons as should be taken by *Turkish* and *Moorish Pirates*.

In the Wars of the French with the Spaniards in Italy, a Horseman was ransomed for the 4th of his yearly Pay. Vide Mariana l. 27. c. 18. And in the last Belgick War, the English dismiss all the Flemings that were taken in War, as they did the like with those of England.

Anno. 1673. *Quam non sit ardua virtus servitium fugisse manu*, it is none of the hardest Vertues to embrace Death to avoid Slavery. † 16, 17. Car. 2. cap. 24. its expired; but His Majesty is yet graciously pleased to consider the state of his poor Subjects, and thereupon hath appointed a Committee of the Lords of the Privy Council, for the managing of that Affair.

VII. Though *Slavery* and *Bondage* are now become discontinued in most parts of *Christendom*, and to that degree, that for the person of man, be he *More* or other *Indian*, a Trover is not maintainable by the Laws of *England*; yet there

* The English Merchants, and others, at the Canaries, do here support this unnatural Custom: So likewise at Virginia, and other Plantations.

Exod. 21. 26.
27.

Vide the Statute of 5 Eliz. who hath provided the like remedy in other places.

there may be a servitude which may amount to a labour or suffering equal to that of Captives, the which may be justifiable; for men either through poverty, and the like, may oblige themselves by Contract for maintenance to a servitude that's perpetual, *i. e.* for life, and so for years; but at this day there is no contract of the Ancestor can oblige his Posterity to an hereditary service; nor can such as accept those Servants, exercise the ancient Right or Dominion over them, no nor so much as to use an extraordinary rigour, without subjecting themselves to the Law. If an Eye or a Tooth had been struck out injuriously, by the Hebrew Law Freedom was immediately due; and by the Greeks, if Servants had been ill treated, it was lawful for them to demand a sale of themselves to others. At Rome the Statues became Sanctuaries for Servants to implore the help of the Governours against rigour, hunger, or any other intolerable injury inflicted by their Masters; and even in London at this day in servitude (amongst the many causes, as not Inrollment of the Indentures, not instructing in the Art, want of necessaries, *infra etatem* 14, &c.) Cruelty, Hunger, Rigour, immoderate Correction, and the like, are causes sufficient on a *Monstrance* or Petition to the Lord Mayor and Alderman to dissolve the Contract, though under Hand and Seal, and to decree all or part of the Dowry, or some given (if any) to the Servant; and if cruelty hath been in the case, to expose the Master to answer damage to the party Servant.

VIII. *Ulpianus* observes after, That by the Laws of Nations Servitude came in, then followed the benefit of Manumission. By the Hebrew Law, after the expiration of the time agreed on, the Servant was to be manumitted, and that not without Gifts, like London's Freedom; by the Custom of which the Master is always at the charge of Cloathing, and discharging the Chamberlains Fees. By the Roman Law, every Son was in such subjection to his Father, that before he could be released of this subjection, and made Free, he should by an imaginary sale be sold three times by his natural Father to another man, who thereupon they called themselves by a new name, *Slave*, which is in their Language *Glorious*; but in after time, (that warmer Climate having thawed their Northern hardness, and not ripened their Wits) when they were conquered, the Italians in derision call them (being then their Bond-men) Slaves, Sir Walter Rawleigh, lib. 2. cap. 17. §. 8.

was called by the Lawyers *Pater Fiduciarius*, that is, a Father in Trust, and then be bought again by his natural Father, and so manumitted by him, and then he became Free: This Form of setting Free was by them called *Eman- cipatio*, Freedom.

That Roman Darling was to be obtained three ways :

1. By Birth, * both, or at least one of their Parents being Free, and such were called *Cives Originarii*.

2. By Gift and Cooptation, when the Freedom was be- stowed on any Stranger or Nation, and then they were termed *Civitati Donati* : And so we read, that *Cæsar* took in whole Nations into the Freedom.

Lastly, By Manumission, which was thus : whenas the Servant was presented by his Master before the *Consul* or *Prætor*, the Master laying his hand upon his Servants head, used this form of words, *Hunc liberum esse volo* ; and with that turning his Servant round, and giving him a Cuff on the Ear, he did *emittere servum è manu* : The *Præ- tor* laying then a certain Wand or Rod, called *Vindicta*, upon the Servants head, replied in this manner, *Dico eum liberum esse more Queritum* ; then the *Lictor* or Serjeant tak- ing the Wand, did strike the Servant on the head, and with his hand he struck him on the face, and gave him a push on the back ; and after this he was Registered for a *Free-man*. This being performed, the Servant having his head shaven purposely at that time, received a Cap as a Token of Liberty.

Tertullian observes, That at this time of their Manu- mission, the Servants received from their Masters a white Garment, a Gold Ring, and a new Name added to their former.

By the *Laws of England* every Subject born within the Kings Dominions, is a *Freeman* of this Realm, as appears by the *Grand Chartar*, cap. 14. yea, though he be a Bond- slave to a Subject : † But a *Stranger* born is no *Freeman*, till the King have made him a *Denizen*, in whose power alone, without the help of any other, one may be made Free.

To be a *Freeman* of the Realm, the place of Birth, is held more considerable than the Quality of the Person ; yet by the opinion of *Hussey* Chief Justice, and in *Calvins* Case of the *Past Nati*, it is held for Law, That if *Ambas- sadors*

Vide leg. 12.

Tabul. Sigonius

de jure Roman.

* *Justin. Instit.*

lib. 1. tit. de In-

gen. Vid. Franc.

Silo in Catilin.

art. 4.

Goodwyn An-

tiq. Rom. 4.

33, 34.

Tertullian. de

resur. Carn.

Magna Charta

cap. 14.

† As to some

things vide po-

stea 5. 9.

1 R. 3. fol. 4.

fadors of this Realm have Children born in *France*, or elsewhere, the Father and Mother being natural born Subjects, the Children are Free of the Realm of *England*: But if either the Father or the Mother of such Children were an *Alien*, then are not those Children Free.

Bacon's Case,
1 Cro. fol. 437.
Stephens Case,
2 Car. in the
Dutchy.

But the Law is conceived to be otherwise at this day. The Statute *de Natis ultra mare*, 25 E. 3. cap. declares the Issue born of an *English* man upon an *English* woman, shall be a *Denizen*; for upon the construction of this Statute it has been adjudged more than once, That if an *English* man marry a *Foreigner*, and has Issue by her born beyond Seas, the Issue is a *Natural born Subject*.

IX. *Disfranchising* by the *Romans*, called *Capitis diminutio*, was threefold, *Maxima*, *Media*, and *Minima*; the least degree was, when the *Censors* pulled a man from a higher Tribe down to a lower, and less Honourable; or when by any *Censure* they disabled a man from suffraging or giving his Voice in the publick Assemblies; such as were thus in the last manner punished, were termed *Aerarii*, and in *aerarios veluti*, quia omnia alia jura Civium Romanorum præterquam tributum & aeris conferendi amiserunt. Gellius relates, That P. Scipio Nasica and M. Pomilius, being *Censors*, taking a view of the *Roman* Knights, observed one of them to be mounted on a lean starvling Horse, himself being exceeding fat; whereupon they demanded the reason, why his Horse was so lean, himself being so fat? His Answer was, *Quoniam ego, inquit, me curo; equum vero servus.*

First granted
17 Joh. Reg.
revived 9 H. 3.
and since confirmed
above thirty times.

By the Ancient Laws of *England*, and by the Great Charter, no *Freeman* shall be taken or imprisoned, but by the lawful Judgment of his Peers (that is, by Jury, Peers for Peers, ordinary Juries for others who are their Peers) or by the Law of the Land; which is always understood by due process of the Law, and not the Law of the Land generally; for otherwise that would comprehend Bond-men, (whom we call Villains) who are excluded by the word *Liber*; for such Bond-men might be imprisoned at the pleasure of his Lord, but a *Freeman* neither could nor can, without a just cause; nor does the Privilege extend to private Actions, or Suits between Subject and Subject, but even between the Sovereign and the Subject. Hence it is, that if a Peer of the Realm be Arraigned at the Suit of

of the King for a Murder, he shall be tryed by his * Peers, that is, by the Nobles. But if he be appealed of Murder upon the prosecution of a Subject, his Tryal shall be by an ordinary Jury of twelve Freeholders; and as the *Grand Charter* did, and does protect the persons of Freemen, so likewise their Free-hold: For by the same *Charter* it is declared, That the King, or his Ministers, shall out no man of his Free-hold without reasonable Judgment; and so it was rul'd upon a Petition in Parliament, setting forth, that a Writ under the Privy Seal, went to the Guardian of the Great Seal, to cause Lands to be seized into the King's Hands, and that thereupon a Writ issued forth to the Escheater, to seize against the form of the *Great Charter*; upon debate of which, the party had Judgment to be restored: the greatest and most Explanatory Act, which succeeded in point of Confirmation, was that of *Edward the Third*, the words are, That no man, of what estate or condition soever he be, shall be put out of the Lands and Tenements, nor taken, or imprisoned, nor disinherited, nor put to death, without he be brought to answer by due process of the Law; that is, by the Common Law.

2. *Diminutio media*, was an Exilement out of the City, without the loss of ones Freedom; the words of the Judgment or Sentence were, *Tibi aqua & igni interdico*.

3. *Diminutio maxima*, was the loss both of the City and the Freedom, and by his Judgment or Sentence was obliged and limited to one peculiar Country, all other places in general being forbidden him.

There was a fourth kind of Banishment, Disfranchising, called *Relegatio*; which was the Exilement only for a season, as that of *Ovid's*,

*Adde quod edictum quamvis immite minaxque,
Attamen in pena nomine lene fuit:
Quippe relegatus, non exul dicor in illo.*

*Ovid. de Trist.
lib. 2.*

The Laws of *England* in this matter have some resemblance with those of the *Romans*; for *Bracton* observes four Distinctions.

1. *Specialis*,

* The Lord
Mortimer and
Montague's
Case for the
supposed Mur-
der of one Hu-
stings, 15 Car.
2. 10. E. 4. 6.
33 Hen. 8.
Bra. title,
Tryals.

8 Ed. 3. R.
Parl. m. 7.

28 E. 3. cap. 3.

In London the same is done by exhibiting an Information in the name of the Common Serjeant, in the Mayors Court there against any Citizen that shall justly deserve so great a dishonour.

* 17 Car. 2. c. 2.

Mr. Selden observes, That in the time of K. Henry the First, and of other Kings, both before and after him, that if any man accused of a Capital crime done

at Sea, being publickly called Five times by the Voice of the Cryer, after so many several days assigned, did not make his appearance in the Court of Admiralty, he was banished out of England; *Et de mere appartenant au Roy d'Angleterre*, for forty years more or less, according to his offence. *Mar. Claus. fol. 12.*

1. *Specialis, hoc est, interdictio talis Provinciae, Civitatis, Burgi aut Villae.*

2. *Generalis, Interdictio totius Regni, & aliquando est.*

3. *Temporaria, pro duobus, tribus, quatuor, aut pluribus annis, aut. &c.—*

4. *Perpetua, pro termino vitae, & exilium est aliquando ex arbitrio Principis, sicut in exiliando Duces Hertfordiae & Norfolciae, per Regem Richardum Secundum, & aliquando per Judicium Terrae, ut fit in casu Piers de Gavilston, & etiam in casu Hugonis de le Spencer Junioris, qui ambo fuerunt exiliati per Judicium in Parlamento.* So likewise was that of the Banishment of the Earl of Clarendon, who dyed beyond Sea*.

X. Abjuration was also a Legal Exile, by the Judgment of the Common Law, as also by the Statute Law; and in the Statute of *Westm. the second, cap. 35.* he that Ravishes a Ward, and cannot render the Ward unmarried, or the value of his Marriage, must abjure the Realm; and this is a general Exile. And by the Statute made 31 Ed. 1. Butchers are to be abjured the Town, if they offend the fourth time, in selling meazled Flesh; and this is a special Banishment.

A man Exil'd does forfeit these things.

1. He loseth thereby the Freedom and Liberty of the Nation out of which he is Exiled.

2. He forfeits his Freedom in the Burrough or City where he was free; for he which forfeits the Freedom of the whole Realm, forfeits his Freedom in every part.

34 E. 1. 1 H. 4.
Bulstrode 3.
part, fol. 188.

3. The Law accounts him as one dead; for his Heir may enter, and so may his Wife enter into her own Lands, and may sue an Action as a Feme sole.

15 E. 3. Fitzh.
Petition pl. 2.

4. He shall forfeit those Lands which he shall purchase in the Realm, during his Banishment; for he during his Banishment is as much disabled to purchase as an Alien; for fit *alienigena* by his Banishment, and he is observed to be in a worse condition than an Alien; for he is marked with *indignatio Principis*. 'Tis true, he cannot forfeit neither

Title

Title of Honour, or Knighthood, nor the Lands he had before Exile, unless there be special Sentence or Judgment, as that of the *Spencers* * * *Totles Magna Charta*, fol. 50, 51.

If the Father be in Exile, this hinders not the Freedom of the Son, for the same is not a thing descendable; for should it be so, then the Banishment of the Father would make a Forfeiture of the Freedom; but the Son has this Freedom by his own Birth, as a purchase, and not by the death of his Father by descent: Like the Case where *J. S.* hath many Children, and then he confesseth himself a Villain to *J. D.* in Court of Record; yet his Children formerly born are Freemen, and no Villains; the reason is, because they were free by their own Births; but the Inheritance is intrahled, because it is to come to the Heir by descent.

XI. A Free-man of a City or Borough may be made divers ways, as my Lord *Coke* observes,

1. By Service.
2. By Birth, by being the Son of a Free-man.
3. By Purchase or Redemption.

At *Bristol* by Marriage.

Sir *John Davies* in his *Irish Reports* observes the same for Law. *St. Paul* was born at *Tarsus* in *Cicilia*, which was under the obedience of the *Romans*, by virtue of which he challenged the privilege of a *Roman Citizen*; but it was accounted no more than a *National Freedom*; like that of *Calvin*, who claimed the general Freedom of an *Englishman*, being born in *Scotland*, but under the obedience of the King of *England*; but that challenge made not *St. Paul* free of the private Customs, Privileges, and Franchises of *Rome*, no more than *Calvin's* Birth made him a free Citizen of *London*, to the particular Customs of that City. Fol. 12.

The King, by his Letters Patents, cannot make one a Free-man of *London*; * yet he may thereby make him a Free-man of his Kingdom.

Luca an Apothecary of the City of *London*, quod ipse omnibus libertatibus quas Civis Civitatis predictae habent in eadem Civitate alibi infra Regnum Angli nostrum habear, gaudeat & utatur, *Gre. Rot. Pat. 32 E. 3.* in the Tower; yet it was held, That this Grant did not make him a Free-man of the City, for it cannot be attained but by one of those ways. King *Edward* the 3^d granted to *John* *Falconer* de

* Case of the City of *London*, Co. 8. Report.

If one be born in a City, of Parents that are not Free, the Child hereby is no Citizen by Birth; and if one be

born of Free Parents out of the place of Priviledges, as London, &c. he yet is a Free-man by Birth; yet in the Charter granted to Yarmouth, the words were, *Concessimus Burghensibus de Magna Yarmutha de villa prædictæ oriundis*, that they should have such and such Liberties: so that special words may alter the case.

London had many Royal Franchises granted them from time to time, and were often by former Kings successively confirmed, nor wanted they a share when the great Charter was granted, to have their ancient Liberties secured; nor were the succeeding Princes slack in their Royal Grants and Confirmations; but especially Richard II. who in Parliament granted and confirmed to them all their ancient Customs and Liberties, with this Clause, *Licet usi non fuerint vel abusi fuerint*; and notwithstanding any Statute to the contrary, amongst the number of their many Priviledges, the Freedom of the same was accounted of no small importance, since in divers Parliaments it was very much aimed at, and endeavoured to be impaired; but at last they obtained a most gracious and Royal Confirmation in Parliament of their ancient Liberties, amongst which it is declared, That no Merchant being a Stranger to the Liberty of the said City, should sell any Commodities within the Liberty of the said City to other Merchant-Strangers; nor that such Merchant-Stranger should buy of any other Merchant-Stranger such Merchandize within the Liberty of the said City, without Forfeiture thereof, saving that any Person, Lord, Knight, &c. may buy within the Liberties of any Merchant-Stranger Merchandizes in gross for their own use, so that they do not sell them again to any other. And as this City by Custom may preclude any person not being free of the same, to sell in such manner upon such pain: so any other City, which are Burroughs or Cities by Prescription within this Realm, may have the like Custom, and the Goods sold or bought by such, may be subjected to Forfeiture, but the same cannot be good by Charter or Grant.

A compleat Free-man is such a one as hath challenged his Freedom, and taken the Free-man's Oath, and is admitted into the Society and Fellowship of the Free-men, Citizens, and Burgeffes, otherwise he hath but a bare right to his Freedom.

Confirmed by
Magna Charta,
cap. 9.
Rot. Parl. 7 R.
num. 37.

9 E. 2. cap. 2.
29 E. 3. cap. 2.
27 E. 3. cap. 11.
7 H. 4. cap. 1.

9 H. 4. this
Act is not
printed.

James Baggs,
Co. 11. Rep.

C H A P. II.

Of Aliens, as in relation to their Estates real and personal.

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| <p>I. Of an Alien his ability and disability in the taking and enjoying of Estates real and personal.</p> <p>II. Of his capacity in purchasing, and disability to transfer by an hereditary descent.</p> <p>III. Of the Rules of descents, according to the Laws of several Countries.</p> <p>IV. Of descents according to the rules of the Common Law of England, lineal and collateral.</p> <p>V. Of Impediments in one that is not the medius antecessor.</p> <p>VI. Of Impediments in one that is the medius antecessor lineal and collateral.</p> | <p>VII. Of the Statute of Natis ultra Mare, and of Issues born beyond the Seas.</p> <p>VIII. The Lord Coke's opinion, that if an Alien has Issue two Sons Denizens, the one purchases Lands, and dies, the other cannot inherit them, debated and refuted.</p> <p>IX. Of Foreign Births which do not create a disability.</p> <p>X. Of Aliens not disabled by Law to bring either real or personal Actions.</p> <p>XI. Of Office that must entitle the King to an Aliens Estate.</p> <p>XII. Of some particular Immunities, and other matters relating to an Alien.</p> |
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I. **A**N Alien is one born in a strange Country, under the obedience of a *strange Prince and State*, and out of the Legiance of the *King of England*, and can have no real or personal Action for, or concerning Lands; and therefore if he purchase Lands, Tenements, or Hereditaments, to him and his Heirs, albeit he can have no Heir, yet he is of capacity to take a Fee-simple, but not to hold; for the King upon Office found shall have it by his *Prerogative*.

Calvinus's Case, Co. lib. 7. Telverton, 199.

So it is if he purchase Lands and dies, the Law doth cast the Free-hold and Inheritance upon the *King*.

Lord Dyer, 283.

But if he purchase or take a Lease for years of a House or Ware-house, which is for the accommodating him as a *Merchant-Stranger*, whose Prince or State is in League with ours, there he may hold the same, for that the same is incident to *Commerce*.

And in that case if he departs and relinquishes the Realm, the King shall have the same, so it is, if he be no *Merchant*.

Pasch. 29 Eliz.
Sir James
Crofts Case by
the Judges.

The like Law is, if he takes a Lease of Meadows, Lands, Woods, or Pastures, the King shall have the same; for the Law provides him nothing *but a habitation to trade and traffick in as a Merchant.*

II. Though he may take by purchase by his own Contract, that which he cannot retain against the King, yet the Law will not enable him by an Act of its own to transfer by hereditary descent (the Alien dying, his issue a *Denizen* born) the Land will not descend, or to take by an Act in Law; for the Law, *Quæ nihil facit frustra*, will not give him an Inheritance or Freehold by an Act in Law, for he cannot keep it.

Therefore the Law
 will not give him

1. By Descent.
2. By Courtesie.
3. By Dower.
4. By Guardianship.

And in respect of that incapacity he resembles a person *Attaint*, but with this difference.

The Law looks upon a person *attaint* as one that it takes notice of, and therefore the eldest Son attainted overliving the Father, though he shall not take by descent in respect of his disability, yet he shall hinder the descent to the younger.

32 Ed. 3.
Cozinage. 3.

But if the eldest Son be an *Alien*, the Law takes no notice of him, and therefore as he shall not take by descent, so he shall not impede the descent to the younger Brother: As for instance, If there be three Brothers, the eldest an Alien, the other two naturalized, and the middle Brother purchase, and dies without issue, the younger Brother shall have the Lands.

3. Report, Rat.
1st's Case.

III. Concerning the Rules of Descents, we are not to govern our selves therein by the general notions of *Love* or *Proximity of Nature*, but by the *Municipal* Laws of the Country wherein the question ariseth; for the various Laws of divers Countries have variously disposed the manner of descents, even in the sameline and degree of *Proximity*: For instance, The Father certainly is as near of kin to the Son, as the Son is to the Father, and is nearer in *Proximity* than a Brother, and therefore shall be preferred as next of kin in administration to the Sons Estate.

According to the *Jews*, for want of issue of the Son, the Father succeeds, excluding the Brothers, and that hath been

been the use and construction of the *Jewish Doctors* upon Numb. 27. 9. but the Mother was wholly excluded.

2. According to the provision of the *Greeks* for the succession or exclusion of the Father, is left doubtful.

3. By the *Roman* or *Civil Law*, according to the estimation of the *twelve Tables*, the Father succeeded in the purchase of the Son for want of issue of the Son, under the title *proximit agnato*, and so was the use; but my Lord *Coke* supposes the contrary.

But taking the whole Institution of *Justinian*, the Son dying without issue, his Brothers, Sisters, Father, or Mother do succeed him as well to Land as Goods, in a kind of *Coparcenary*.

4. According to the Laws of *Normandy*, (which in some things have a cognition with our Law) his Brothers are preferred before the Father, (if the Son die issueless) but his Father before his Uncle.

5. According to the Laws of *England* the Sons dying sans issue, or Brothers, or Sisters, the Father cannot succeed, but it descends to the Uncle.

IV. There be two kinds of descent, according to the *Common Laws* of this Realm.

1. *Lineal*, from the Father or Grandfather to Son or Grand-son.

2. *Collateral* or *transversed*, as from Brother to Sister, Uncle to Nephew, and *è converso*: And both these again of two sorts.

1. *Immediate*, as in lineals from Father to Son.

2. *Mediate*, as in lineals from Grandfather to Grand-child, where the Father dying in the life time of the Grandfather, is the *medium differens* of the descent.

Collateral, as in lineal from Uncle to Nephew, or *è converso*.

And this mediate descent, or mediate Ancestor, though to many purposes it be immediate; for the Father dying in the life of the Grandfather, the Son succeeds in point of descent in the Lands immediately to the Grandfather; and in a Writ of *Entry* shall be supposed to be in by the Grandfather, and not in the *post & cui*.

This is called a mediate descent, because the Father is the *medium* through whom the Son derives his title to the Grandfather.

Seld. de successione apud Hebræos, cap. 20.

Comment on Littleton, fo. 10. 8. tit. 1. de hereditibus ab intestato venientibus.

Goodwyn Antiq. de Testamentis, fo. 233. Customs Normand. c. descheancres.

Grotius de Jure Belli ac Pacis, lib. 2. cap. 7.

In immediate descents there can be no impediment, but what arises in the Parties themselves : For instance, the Father seized of Lands, the impediment that hinders the descent must be in the Father or Son, as if either of them be attaint or an Alien.

In immediate descents, a disability of being an Alien or Attaint, in him that is called the *medius antecessor*, will disable a person to take by descent, though he himself have no such disability.

In *lineal* descents, if the Father be Attaint or an Alien, and hath issue a *Denizen* born, and die in the life time of the Grandfather, the Grandfather dies seized, the Son shall not take, but the Land shall *escheat*.

Dyer, 274.
Graves.

In *collateral* descents, *A.* and *B.* Brothers, *A.* is an Alien or Attaint, has issue *C.* a *Denizen* born, *B.* purchases Lands and dies without issue, *C.* shall not inherit, because *A.* which was the *medius antecessor* or *medium differens*, is incapable.

V. But in any descents, the impediment in an Ancestor that is not *medius antecessor*, from whom and to whom will not impede the descent.

Courtney's case,
Common
Pleas Coron.
fol. 141.

As for instance, The Grandfather and Grandmother both Aliens, or attaint of Treason have issue, the Father a *Denizen*, who hath issue the Son a *natural born Subject*, the Father purchases Lands, and dies, the Son shall be Heir to the Father, notwithstanding the disability of the Grandfather, (and yet all the Blood which the Father hath is derived from his disabled Parents) for they are not *medii antecessores*, between the Father and the Son, but *paramont*.

Mich. 1 Car.
Cro. 3. Parr,
Caroon's case.

The Law does not hinder, but that an Alien is of the same degree and relation of consanguinity, as natural born Subjects or *Denizens* born, the Son, Father and Brother though Aliens; the Son, Father and Brother our Law takes notice of as well as natural born Subjects, and so it was adjudged, for he shall be preferred in *Administration*, though an Alien, as next of kin.

32 Ed. 3. tit.
Cozinage. 3.

But in cases of *Inheritance* the Law takes no notice of him, and therefore as he shall not take by descent, so he shall not impede the descent to the younger Brother: As for instance, *A.* an Alien, *B.* and *C.* naturalized by Act of Parliament, (*Brothers*) *B.* purchases Lands, and dies *sine prole*, *C.* shall inherit, and not *A.*

A. an Alien, *B.* and *C.* his Brothers both naturalized by Act of Parliament, *B.* purchases Lands, and dies without issue, the same shall not come to *A.* nor to his issue, though a Denizen, but shall come to *C.* and his issue; the Law taking no notice of *A.* as to impede the succession of *C.* or his issue, though it work a consequential disability to bar the issue of *A.* parallel to what the Law calls Corruption of Blood, which is a consequent of Attainder.

Ramsey's Case
15 Car. 2. in
Com. Banc.

VI. Again, in lineal descents, if there be a Grandfather natural born Subject, Father an Alien, Son natural born Subject, the Father is made Denizen, he shall not inherit the Grandfather; and if the Father dies in the life of the Grandfather, the Grand-child, though born after the Denization, doth not remove neither the personal nor consequential impediments or incapacity of the Father.

In collateral descents, the Father a natural born Subject has issue two Sons Aliens, who are both made Denizens, and dies without issue, the other shall not inherit him.

Godfrey and
Dixon's Case,
Hill. 16 Jac.
in B. R. God-
bolt, 275.

A. an Alien marries an English Woman, who is seized of Lands and has issue, the Father and Mother dies, yet the issue may inherit the Mother, non obstante the incapacity of the Father being an Alien.

VII. The Statute *de Natis ultra Mare*, declares the issue born of an English Man upon an English Woman shall be a Denizen; yet the construction has been, though an English Merchant marry a Foreigner, and has issue by her born beyond the Seas, that issue is a natural born Subject.

*De Natis ultra
Mare*, 25 Ed. 3.
2 Car. in the
Duchy in Ste-
phen's Case.

But if an English Woman go beyond the Sea, and there marry an Alien, and have issue born beyond the Sea, that issue are Aliens.

16 Car. 1. Cra.
437. Bacon's
Case.

If an English Woman marries an Alien beyond the Seas, and then comes into England and has issue, they are not Aliens, but may inherit.

Provdos Case
of Kent.

My Lord Coke in his Commentaries on Littleton, seemsto be of opinion, That if an Alien has issue two Sons born in England, one dying without issue, the other shall not inherit him. But the Law is otherwise taken at this day, as I conceive the reasons that have been given, are,

Com. Lit. fol. 3.

1. Though the descent from one Brother to another Brother be a collateral descent, yet it is an immediate descent, and consequently if no disability or impediment can be found in them, no impediment in another Ancestor will hinder the descent between them.

Per L. C. J.
Hales in Ram-
sey's Case.

That

That this is an immediate descent, appears,
First, In point of pleading, one Brother shall derive himself as Heir to another, without mentioning any other Ancestor.

Secondly, According to the computation of Degrees, Brother and Brother make but one degree, and the Brother is distant from his Brother or Sister in the first degree of Consanguinity and no more, by the Laws of England.

According to the Civil Law *, Brother and Brother make but one degree, for the Brother is in the second degree from the Brother; yet both make but one degree.

According to the Canon Law †, *Frater & Frater, or Frater & Soror sunt in primo gradu.*

And therefore the Laws prohibiting Marriage between Kindred in the fourth degree, takes Brother and Sister to be the first degree of the four.

The Laws of England in computation of the degrees of Consanguinity agrees with the Canon Law, and reckons the Brother and Brother to be the first degree.

Herewith agree the Customs of Normandy *, which, though in some cases differ from the Laws of England, yet herein, and in divers other particulars touching descents, they agree.

Another Evidence to prove that the descent between Brother is immediate, is this, (*viz.*) the descent between Brothers differs from all other collateral descents whatsoever, for in other descents collateral the half blood does inherit, but in a descent between Brother the half blood does impede the descent, which argues that the descent is immediate.

The Uncle of the part of the Father has no more of the blood of the Mother, than the Brother by the second venter, the Brother by the second venter has the immediate blood of the Father with the Uncle (*viz.* the Father's Brother) has not but only as they meet in the Grandfather; the Brother of the half Blood is nearer of Blood than the Uncle, and therefore shall be preferred in Administration.

It is apparent, that if in the line between Brother and Brother, the Law takes notice how the Father was the medium thereof, the Brother of the second venter should rather succeed to the other Brother, because he is Heir to the Father; therefore in a descent between Brothers the

Law

* Just. l. 9. tit. de gradibus consanguinitatis 38.
† Decret. Gratiani, cap. 35. quest. 5.

Litt. Sect. 20. 31. Ed. 3. Gard. 116.

Holland's Case cited by Littleton.

* Servien in Compres, degrees in line Collat. Solenk. &c.

Brown's Case, Mich. 1655 B. R. contra

5 E. 6. Bro. Administration 47. which prefers the Brother of the half blood before the Mother.

Law respects only the *immediate relation of the Brothers as Brothers*, and not in respect of the Father, though it is true, the foundation of their Consanguinity, is in their Father or Mother.

Again, if the Father, in case of a descent between Brothers, were such an Ancestor as the Law lookt upon as the *medium* that derives the descent from the one Brother to the other, then the Attainder of the Father would hinder the descent between the Brothers: But the Attainder of the Father does not hinder the descent between the Brothers; the reason is, because *the Father is not such a medium or nexus* that is looked upon by the Law, as the means deriving such a descent between the two Brothers: As for instance of three cases, two whereof evince the first proposition, (*viz.*)

That although the descent from one Brother to another Brother, though it be a collateral descent, yet is an immediate descent, *and that if no disability or impediment arises in them*, no impediment in another Ancestor will hinder them.

The younger Brother has issue, and is attainted of Treason and dyes, the elder Brother has title to a *Petition of Right*, dyes *sans* issue without a restitution, the younger Brothers Son has lost that title; for though the title were in the Ancestor that was not attaint, yet his Father that is the *medium* whereby he must convey that title was attaint, and so the descent was obstructed.

10 Eliz. Dyer,
274. Grayes
Case.

Henry Courtney had issue *Edward*, and was attainted of Treason and dyed, *Edward* purchased Lands and dyed without issue, the Sisters and Heirs of *Henry* were disabled to inherit *Edward*; yet neither *Edward* nor his Aunts were attainted, or their blood corrupted, yet because *Henry* was the *medium through whom* the Aunts must derive their Pedigree and Consanguinity to *Edward*, who was attainted, the descent was obstructed till a restitution in blood.

Com. placit. Coron. fol. 241.
Henry Courtney's Case.

But if the Grandfather of *Edward* had been attainted, and not *Henry*, this would not have hindred the descent from *Edward* to the Aunts, because that Attainder had been *paramount* that Consanguinity which was between *Henry* and his Sister, and that is proved by this third case.

William Hobby had issue *Philip* and *Mary*, and was attainted

ed

Mich. 40, 41.
Eliz. ruled in
the Exchequer
in the Case of
Hobby.

ed of Treason and dyed, *Philip* purchaseth Lands, and dyed without issue; it was adjudged in that case, that *non obstante* the Attainder of *William Hobby*, *Mary* should inherit, because the descent and pedigree between *Philip* and *Mary* was immediate, and the Law regards not the disability of the Father.

49 E. 3. 12.
per Tank and
Perthay.

If the Heir of the part of the Father be attaint, the Land shall escheat, and shall never descend to the Heir of the part of the Mother; but if the Son purchase Lands, and has no kindred of the part of the Father but an Alien, it shall descend to the Heirs of the part of the Mother.

Co. 7. Rep. 21.
Calvin's Case.

IX. Those that are born *sub fide, legiantia, obedientia Domini Regis* are not Aliens; and therefore those that were born in *Gascoyn, Normandy, Aquitain, Turnay, Calais, Guyan*, whilst they were under the Dominion of the Kings of *England*, were natural born Subjects, and not Aliens.

Lord Vaughan,
fol. 268. Craw.
versus Ramsay.

Scotland is a Kingdom by union, and therefore those that were born in *Scotland* under the Allegiance of the King, as of this Kingdom of *Scotland*, before the Crown came united, were Aliens born, and such plea against such persons was a good plea; but those that were born since the Crown of *England* descended to King *James*, are not Aliens, for they were born *sub fide & legiantia Domini Regis*; so those that are born at this day in *Virginia, New England, Barbadoes, Jamaica*, or any other of his Majesties Plantations and Dominions, are natural born Subjects, and not Aliens; so likewise those that are born upon the King of *England's* Seas, are not Aliens.

Sir John Bur-
rough's Sove-
raignty of the
Seas, fol. 102.

X. But if an Alien be made an Abbot, Prior, Bishop, or Dean, by the plea of an Alien, we shall not disable him to bring any real or mixt action concerning the possessions that he holds in his politick capacity, *because the same is brought in autur droit.*

Pasch. 31 Eliz.
C. B.

The like Law is for an Executor or Administrator, because the recovery is to anothers use.

Mich. 6 Jac. in
C. B. Brownlow
1. part, fol. 45.

If an action is brought against an Alien, and there is a Verdict and Judgment against him, yet he may bring a Writ of Error and be Plaintiff there, and that such plea is not good in that case.

Though an Alien may purchase and take that which he cannot keep or retain, yet the Law hath provided a mean
of

of inquiry before he can be divested of the same, for untill Office be found, the Freehold is in him.

And this Office, which is to gain to the King a Fee or Freehold, must be under the *Great Seal of England*, for a Commission under the *Exchequer-Seal* is not sufficient to entitle the King to the Lands of an Alien born, for the Commission is that which gives a title to the King, for before that the King hath no title; but in cases of *Treason* there upon Attainder, the Lands are in the King without Office; and in that case, to inform the Court, a Commission may go out under the *Exchequer-Seal*.

XI. If an Alien and a Subject born purchase Lands to them and to their Heirs, they are *joynt Tenants*, and shall joyn in Affize, and the Survivor shall hold place till Office found.

By the finding of this Office the party is out of possession, if the same be of Houses or Lands, or such things as do lye in livery; but of Rents, common Advowsons, and other Inheritances incorporeal which lye in Grant, the Alien is not out of possession (be they appendent or in gross) therefore if an Information or an Action be brought for the same, the party may traverse the Office in that Court, where the Action or Information is brought for the King.

And if the King obtains not the possession within the year after the Office found, he cannot seize * without a *Seire facias*.

It is not for the *Honour of the King* (an Alien purchasing of a Copy-hold) to seize the same, for that the same is a base Tenure; and so it was adjudged † where a Copy-hold was surrendered to *J. S.* in trust that one *Holland* an Alien, should take the profits thereof to his own use and benefit; upon an Inquisition taken, it was adjudged the same was void and should be quashed, because the King cannot be entitled to the Copy-hold Lands of an Alien, nor to the use of Copy-hold Lands as the principal case was.

An Alien Infant under the age of 21 years, cannot be a Merchant Trader within this Realm, nor can he enter any Goods in his own name at the Custom-house.

If an *English* man shall go beyond the Seas, and shall there become a sworn Subject to any *Foreign Prince* or *State*, he shall be looked upon in the nature of an Alien, and shall

pay

Mich. 29 Eliz.
in *C. B. Gold-*
borough, Fo. 29.
Mich. 30 Eliz.
Coke 5. part,
Pages Case, fol.
52 Moore 4.
Walton ver.
Mashum.
Dyer 282. A-
lien Stamfords
Prerogative
Regis, art. 18.
fol. 53. tit.
Kings Scissin,
&c.
Cross ver.
Gayer Cro. 3.
part, fol. 123.
Plowd. Com.
477.
17 E. 3. fol.
10. Hen. Hills
Case.

* 29 Affize 30.
32. 32. Affize
Travers 32.
vouched in
Stamfords plr.
fol. 54. cap.
18.
† 23 *Car. in*
B.R. Styles 20.
King ver. Hol-
land.

Stat. 14. Car.
2. cap. 11.

14. 15 H. 8.
cap. 4.

pay such Impositions as Aliens; if he comes and lives in *England* again, he shall be restored to his liberties.

Hill. 12. Jac. An Alien is robbed, and then he makes his Executor, *Bulstrod 3. part.* and dyes, and afterwards the Goods are waft, the Lord *fol. 19. cited in* of the *Fränschise* shall not have them, but the Executors. *Sir Thom. Walter's Case.* *Vide Stat. 13 E. 4.*

Telverton 199. All personal actions he may sue, as on a Bond, so likewise for words; for the *Common Law* according to the *Turlotte versus Monson 8. Jac.* Laws of Nations protects Trade and Traffick, and not to *B. R.* have the benefit of the Law in such cases is to deny Trade.

Moore, fol. 481.

But yet Aliens and Denizens are restrained by the Statute of 5 *Elix. Ca.* to use any Trade, not having served seven years as Apprentices within the Realm. *Vide* the Statute what Trades, *Trin. 12 Car. 1.* at Sergeants-Inn in *Fleet-street* by all the Judges. *Hutton's Reports, fol. 132.* but *quare* that Resolution.

CHAP.

CHAP. III.

Of Naturalization and Denization.

- I. Whether the Kings of England can naturalize without Act of Parliament.
- II. What operation Naturalization hath in reference to remove the disability arising from themselves.
- III. What operation Naturalization hath in reference to remove defects arising from a lineal or collateral Ancestor.
- IV. Where persons born out of the Realm may inherit by the Laws of England.
- V. A Kingdom conquered, and united to the Crown of England, whether by granting them a power to make Laws, can implicitly create in them such a Sovereignty, as to impose on the Realm of England.
- VI. Of persons naturalized by a Kingdom dependent, whether capable of imposing on one that is absolute.
- VII. Of Kingdoms obtained by conquest how the Empire of the same is acquired, and how the Conquest succeeds.
- VIII. Ireland what condition it was accounted before the Conquest, in reference to the Natives of the same, and whether by making it a Kingdom, they can create a Foreigner as a natural born Subject of England.
- IX. Of Aliens, in reference to the transmission of their Goods and Chattels by the Laws of France.
- X. Of the Privileges the Kings of England, of old, claimed in the Estates of Jews dying commorant here, and how the same at this day stands.
- XI. Of persons born in places annexed or claimed by the Crown of England, how esteemed by the Laws of the same.
- XII. Of Denization, and what operation it hath according to the Laws of England.
- XIII. Where an Alien is capable of Dower by the Laws of England, and where not, and of the total incapacity of a Jew.
- XIV. Whether a Denizen is capable of the creation and retention of Honour, by the Laws of England.

I **T**HE Father and Mother are the fountain of the blood natural, and as it is that that makes their Issue, Sons or Daughters, so it is that that makes them Brothers and Sisters; but it is the civil qualifications of the blood that makes them inheritable one to the other, and capable of enjoying the Immunities and Privileges of the Kingdom; but that is from another fountain, *viz.* the Law of the Land, which finding them legitimate, doth transplant them into the Civil rights of the Land, by an Act called Naturalization; which does superinduce and cloathe

cloathe that natural Consanguinity with a Civil hereditary quality, whereby they are enabled not only to inherit each other, but also to enjoy all the Immunities and Privileges that meer natural born Subjects may or can challenge.

Serv. lib. 2.
cap. 12.

II. According to the Laws of *Normandy* the Prince might *naturalize*; but such *Naturalization* could not divest the descent already vested.

But according to *our Law* by no way but by *Act of Parliament*, and that cures the defect as if they had been born in *England*, and no man shall be received against an *Act of Parliament* to say the contrary.

Therefore if the Father an *Alien* has issue a *Son* born *here*, and then the *Son* is naturalized, the *Son* shall inherit.

Com. Litt. 129. If the Father, a natural born Subject, has issue an *Alien* who is *naturalized*, the Father dyes, the *Son* shall inherit.

III. *Naturalization* does remove all that *disability* and *incapacity*, which is in *Aliens* in respect of themselves, and so puts them entirely in the condition as if they had been born in *England*.

The *Relative* terms, as if born in *England*, is generally used to supply the *personal defect* of the parties naturalized, arising from their *birth out of England*, and therefore shall never be carried to a *collateral* purpose, nor cures a disease of another nature, as *half blood*, *illegitimation*, and the like; but all diseases, whether in the parties themselves, or resulting from the Ancestor, it cures.

Acts of Parliament of this nature may be so pen'd, as to cure defects in the Father or Ancestor, or in the parties themselves.

Coke 3. Instit.
fol. 241.

If *Restitution* in blood be granted to the *Son* by *Act of Parliament*, this cures that *disability* that resulted from the Fathers *Attainder*, and that not only to the *Son*, but also to the *collateral Heirs* of the Father; the true reason of this is, because the corruption of the blood by the *Attainder* is only of the blood of the Father, for the Sons blood or collateral Heir was not at all corrupted; for the scope of the *Act* taking notice of the Fathers *Attainder*, does intentionally provide against, and remove it, for otherwise the same had been useless.

But in *Naturalization* without express words, it takes
no

no notice of the defects in the Father or other Ancestor, nor removes them.

And therefore such *Acts of Parliament* as take no other notice but of the *person naturalized's Foreign birth*, the same cures not any disability of *transmission hereditary* between the Father, Brother, or any other Ancestor, *resulting* from the disability of them without *actually naming of them*: As for instance, the Father an Alien, the Son naturalized by Act of Parliament, the Father or any other Ancestor an Alien purchases Lands and dyes, the Son shall not take by reason of the disability in the Father, but there *may be words* inserted in the Act that may take away the impediment.

IV. There are four ways by which men born out of *England* may inherit in *England*, besides by the Statute of *Edward the Third, De Natis ultra mare*.

1. If they be born in any Dominion of the King's, when he is actually King of *England*.

2. If they be made inheritable by Act of Parliament in *England*.

3. If they be born Subjects to a Prince holding his Kingdom or Territories as Homager and Leigman to the King of *England* during the time of his being Homager: So the *Welch* were inheritable in *England* before 12 Ed. 1. though *Calvin's Case, fol. 21. b.* Subjects to the Princes of *Wales*, who were Homagers to the King of *England*. So were the *Scotch* in *Edward the First's* time; but when once the Homage determines, then they become Aliens, otherwife Subjects, and upon that reason *Magdulphe* a *Scot* appealed * from the Judgment of his Prince to *Edward the First ut Superiori Domino* * *Placit. Parl. 21 Ed. 1. fol. 152, 157.* *Scotie*; but then it must be understood where such Prince is Homager *subjectionis*, and not only *infeodationis*, for another King may hold of the King of *England* an Island or other Territory by tenure, and not be his Subject.

4. If the King of *England* enters in a hostile manner the Territories of another Prince or State, and any be born within any of the places or Guards possessed by the Kings Army, they are looked upon in Law to be within his protection, and such person born is a natural born Subject of *England*, but then he must be of parents Subjects †, not † *5 Eliz. Dyer, fol. 224. placit. 29.* hostile; and therefore a Bastard born in *Tangier* is capable of purchasing Land in *England*, if his parents were Subjects.

V. Those

Craw vrs.

*Ramsay, Lord
Vaughan, fol.
280.*

V. Those that are born in *Ireland*, and those that are born in *Scotland* are all alike, for their births are within the Kings Dominions, and they are born under the like subjection and obedience to the King, and have the like band of allegiance *ad fidem Regis*; yet if a *Spaniard* comes into *Ireland*, and by the *Parliament* is there naturalized, though perhaps this may qualifie and cloathe him with the title of a *natural born Subject* of *Ireland*, yet it has been conceived, that it will not make him a *natural born Subject* of *England*.

For the union of *Ireland* to that of *England*, is different from that of *Scotland*; for the first is dependent, as a Kingdom conquered, the latter independent: Though *Henry* the Second after his Conquest of that Nation, did remit over from *England* the ancient *modus tenendi Parliamentum*, enabling them to hold Parliaments, which after was confirmed by King *John*; yet that was by no other force than bare Letters Patents. Now when a Nation is once conquered, there remains no Law, but that of the Conqueror; and though he may incorporate such conquered Nations with his own, and grant unto them their ancient Parliamentary ways of making of Laws; yet the Conqueror can no ways grant unto them a power, by virtue of such Grant or Confirmation, as to impose upon his own Country, for he himself before such Conquest, could not make a *natural born Subject* without Act of Parliament, and most certainly his Conquest adds nothing to his power, though it does increase his Dominion.

VI. Again, Kingdoms that are absolute under one Prince, *ad fidem Regis*, there the Acts of each other are reciprocate, and one naturalized by the Parliament of *Scotland*, is as naturalized in *England*, because *Scotland* is a Kingdom absolute, and yet in the Case of *Craw* and *Ramsay* it is there held, That an Alien naturalized in *Scotland* remains an Alien notwithstanding; but *Ireland* is a Kingdom dependent and subordinate to the Parliament of *England*, for the Parliament in *England* can make an Act to bind *Ireland*, but not *è converso*. Now to be a Native of *Ireland*, is the same as to be born in *Ireland*, but that is by the Laws of *Ireland*; but to be born in *Ireland*, and to be the same as to be born in *England*, must be by the Laws of *England*. But there is no Law that hath enabled them with such a power.

*Selden's Titles
of Honour, fol.*

213. in Scotland, the title is Carolus Scotia, Anglia, Francie, & Hibernia Rex; but in Ireland, Anglia, Scotia.

Note, Scotland is not a Dominion belonging to the Crown of England, but to the King of England.

power as to naturalize further than their own Laws extend; but the Law of *Ireland* does not extend into *England*, therefore Naturalization in *Ireland* operates only in *Ireland*, because of the failure of power.

VII. Again, Kingdoms that are conquered, the Empire of the same may be acquired by the Conqueror, only as it is in a King, or other Governour, and then the Conqueror only succeeds into his right, and no further *, or also as 'tis in the People, in which case the Conqueror hath Empire, so as that he may dispose of it, or alienate it as the People themselves might; for 'tis one thing to inquire of the thing, another of the manner of holding of it, the which are applicable not only to corporal things, but incorporal also: For as a Field is a thing possessed, so is a passage, an act, a way; but these things some hold by a full right of property, others by a right of usufructuary, others by a temporary right. Again, by the will of the Conqueror, the Kingdom or Republick that is so conquered, may cease to be a Kingdom or Commonwealth, either so that it may be an accession of another Kingdom or Commonwealth, as the *Roman* Provinces, or that it may no ways add here to any Kingdom or Commonwealth, as if a King waging War at his own charge, so conquer and subject a People to himself, that he will have them governed, not for the profit of the people chiefly, but of the Governour, which is a property of that we call *Herile Empire* †, not of Civil; for Government is either for the profit of the Governor, or for the utility of the Governed; this hath place among Free-men, that among Masters and Servants. The People then that are kept under such command, will be always for the future not a Commonwealth, but a great Family: hence it is that we may plainly understand, what kind of Empire that is, which is mixt of Civil and Herile, that is, where Servitude is mixt and mingled with some personal liberty: For if the People are deprived of Arms, commanded to have no Iron but for Agriculture, to change their Language and course of Life, and abstain from the use of many of their Customs, to be confined * to their own Houses, Castles, or Plantations, not wander abroad to be governed by such Laws as the Conqueror should transmit

de Republica. * Case of the Earl of Shrewsbury on the Stat. of 28 H. 8. of Absentees, 4. Inst. prescribes, fol 354.

* From hence it is that the King at this day cannot alien or sell *Ireland* without an Act of Parliament, for they whose right he succeeds, could not do it, Co. 4. Instit. fol. 357. nor can he grant, *Portus Maris obedientis, ad vocationibus, & patronationibus Ecclesiarum Metropolitana-rum & Cathedralium Cancellar. Justiciar. nor mero & mixto Imperio*, and many more, all which are inseparably annexed to a Kingdom. † Imperium aliud est ob utilitatem ejus qui regitur, hoc inter liberos locum habet, illud inter dominos & servos, Arist. lib. 7.

* Or else they came to London for them, Cl. 18 H. 3.

m. 17. *Ariovistus apud Cæsarem, jus esse belli ait, ut qui vicissent, iis quos vicissent quemadmodum vellet imperarent, de bello Gallico, l. 1.*

† *Leg. qui in servitute est, de reg. juris Leg. si venerit D. ad Leg. Jud. de Adult.*

to them *, all which are the tokens of a Nation by Conquest made subordinate to the Conqueror, and are part Herile, and part Civil; and though they may remain a Kingdom, and absolute within themselves as to the making of Laws, to the obliging each other, yet they can no ways impose on their Conqueror, for though that be true which in *Quintillian* is alledged on the behalf of the *Trebans*, That that only is the Conqueror's which he holds himself; but an incorporeal right cannot be holden, and the condition of an Heir and of a Conqueror is different, because the *Right* passeth to the former by the descent, but only the *thing* to the last by virtue of the Conquest. But certainly that is no objection, for he that is Master of the persons, is also Master of the things, and of all right which does belong to the persons; for he that is possessed †, doth not possess for himself, nor hath he any thing in his power who hath not himself; and so it is, if he leaves the right of a Kingdom to a conquered people, he may take to himself some things which were the Kingdom's, for it is at his pleasure to appoint what measure he will to his own Favour: from hence it is we may observe what sort of Empire that Kingdom is at this day.

VII. Now *Ireland* before the same became united to the Crown by the Conquest of *Henry the Second*, the Natives were meer Aliens, and out of the protection of the Laws of this Realm; yet when once they became a conquered People, and subject to the Crown of *England*, and united *ad fidem Regis*, then did arise their Allegiance, but that *Union* neither made them capable of the Laws of *England*, nor of their own, till such time as the Conqueror had so declared them: now what do they desire in order to revive their Government? First, they humbly beg of King *Henry the Second*, that since he was pleased that they should remain as a distinct Dominion, that their ancient Customs or Usages should not continue; that he would be pleased or ordain, that such Laws as be had in *England* * should be of force, and observed in *Ireland*; pursuant to which he grants them power to hold Assemblies by the three Estates of the Realm, and that they should be regulated according to the Institution and manner of the Parliaments in *England*, For at a general Council at *Caesars* of all the Clergy there, Anno 1170. Ecclesiastical Laws of *England* were established, and made of force in *Ireland*, *Geraldus Cambrensis Topographia Hibernie*, lib. 3. cap. 18. * *Par. 8 E. 1. m. 13. Hibern.*

should

should have the benefit of *Magna Charta*, and other the great Laws of *England**, and by such means put them into a method of governing themselves according to the known ways of *England*, and to make such Laws as should bind among themselves; and by following the example of those of *England*†, their Judgment might be supervised, and corrected according to the Justice and Laws of *England*, by Writs of Errour, Appeal, and the like*.

* Matthew
Paris Hist.
Angl. pag. 121.
Leges Angliae
ab omnibus sunt
grate acceptae.
† Oruck's Case,
33 Eliz. Coke
7. part. fol. 23.

Calvin's Case. * Rely Placita Parliam. pag. 192. to 206g

Now here is no continuing or reviving their ancient Government, but the introducing a new one, part Civil, and part Herile, nor indeed had they before any such thing as a Parliament there, or general Assembly of the three Estates; for when *Henry* the Second went over, there were several Kings or Sceptes, who had their several and distinct Assemblies; but when they submitted, this great Assembly of Estates which he constituted, was a collection out of all of them, for their future well Government; so that whatsoever *modus* of Regiment the Conqueror declared, it was no more than for the well governing of the place, and making such Laws as were necessary, and proper amongst themselves: But for them to impose, by virtue of an Act of Naturalization, upon an absolute Kingdom as *England*, without the consent of the three Estates of the same, surely was never intended, much less effected: the case is both great, dubious, and curious, therefore *quære*.

Sir John Davies on the
Conquest of
Ireland, 103,
104, 105.

Lord Vaughan,
fol. 301. *Craw*
versus Ramsey.

IX. By the Laws of *France* all persons not born under the legiance of that King, are accounted Aliens, and if they die, the King is entitled to the Estate, for all shall be seized into his *Exchequer* or *Finances*; but if they make a Will, the Prerogative is disappointed: Yet that extends only to Chattels personal, in which Strangers passing through the same, have greater Immunities than Aliens there resident; for Travellers dying without Will, the Heirs or Executors shall have benefit and possession of their Estates.

X. The like Privilege the Kings of *England* formerly claimed in the Goods and Estates of the *Jews* after their death, if the Heir sued not, and paid a Fine to the King to enjoy them, as by this Record appears.

Inratores super sacrum suum dicunt quod prædictum Messia-
gium

*Escheat An. 52.
H. 3. num. 31.*

gium fuit quondam Eliæ le Bland, qui, &c. diem clausit extremum, & quia mos est Judæismi quod Dominus Rex omnia, & Catalla Judæi mortui de jure dare poterit cui voluerit, nisi propinquior hæres ejusdem Judæi finem fecerit pro eisdem, dicunt quod Dominus Rex dictum Messuagium dare poterit cui voluerit sine injuria alicui facienda, si ita quod sit hæres dicti Eliæ, finem non fecerit pro Catallis ejusdem Eliæ habendis, &c.

*Caroon's Case.
Hobby's Case.
Stephen's Case.*

But whether the same is now used, may seem doubtful, for the Goods of Aliens escheate not at this day to the Crown, but Administration shall be committed to the next of kin.

XI. By the Laws of France, Flanders, Milan, Savoy, and the *Francbe Compté*, though possessed by several other Princes, yet the Natives of the same partake in the Immunities with the natural born Subjects of France, and if they die without Will, their Heirs claim their Estates; the reason given, because, say they, those Countries were never alienated from them, but were always annexed to the Crown of France, who acknowledges them to be their Subjects to this day.

Note, This was before the Statute of 25 E. 3. 11's vouched by Shard in 4c. Affize pl. 24. see Calvin's Case 7. Report.

But in England it is otherwise, for those that are born in Gascoign, Normandy, Aquitain, and those other Territories which were formerly the possessions of the Crown of England, in which if any had been born when subject to the same, they would have been natural born Subjects, yet now are esteemed Aliens; and so was the case vouched by *Shard*, of a Norman, who had robbed together with other English, divers of his Majesties Subjects in the narrow Seas, being taken and arraigned, the Norman was found guilty only of Felony, and the rest of Treason; for that *Normandy* being lost by King *John*, was out of the Allegiance of *Ed. 3.* and the Norman was accounted as an Alien.

XII. In France the Kings may there Denizize, so likewise here in England, but with this difference, the Letters of Denization by those of France remove the total disability and incapacity of the Alien.

But in England the Charter of Donation or Denization is but a temporary, partial, and imperfect amotion of the disability of an Alien; for though it puts the person Indenized, as to some purposes, in the condition of a Subject, and enables a transmission hereditary to his Children, born after the Denization, yet it does not wholly remove the

disease

disease or non-ability, as to the points of *descent or hereditary transmission*, and resembles a person in case of an *Attainder*; *Co. 1. Inst.* and therefore if he purchases Lands, and dies without *fol. 2.* issue, the Lord by Escheat shall have the Lands.

And therefore in lineal Descents, if there be a Grandfather natural born Subject, Father an Alien, Son natural Subject, the Father is made Denizen, he shall not inherit the Grandfather; and if the Father dies in the life of the Grandfather, the Grand-child (though born after the Denization) shall not inherit the Grandfather, for the Denization does not remove, neither the personal nor the consequential impediment, or incapacity of the Father.

So likewise in collateral Descents; as for instance, the Father a natural born Subject, has issue two Sons Aliens, who are both made Denizens, and one dies, the other shall not inherit him.

Godfrey and Dixon's Case.

Hill. 16 Jac.

B. R. Godbolt.

175.

XIII. The like Law in Dower, a Man seized of Lands in Fee, and takes an Alien to Wife, and then dies, the Wife shall not be endowed: But if the King takes an Alien to Wife, and dies, his Widow Queen shall be endowed by the Law of the Crown. *Edmund*, Brother of King *Edward* the First, married the Queen of *Navar*, and died, and it was resolved by all the Judges, That she should be endowed of the third part of all the Lands whereof her Husband was seized in Fee.

30 H. 8. *Dyer*

44.

26 Ed. 1. *Rot.*

part 1.

A *Jew* born in *England*, takes to Wife a *Jew* born also in *England*, the Husband is converted to the Christian Faith, purchaseth Lands, and enfeoffeth another, and dieth; the Wife brought a Writ of Dower, and was barred of her Dower, *Quia vero contra justitiam est quod ipsa dotem petat, vel habet de tenemento quod fuit viri sui ex quo in conversione sua noluit ei adherere, & cum eo convertere.*

Claus. 1 H. 3.

Mem. 17. Dors.

XIV. If an Alien be a Disseisor, and obtains Letters of Denization, and then the Disseisor release unto him, the King shall not have the Land; for the Release hath altered the Estate, and it is as it were a new purchase, otherwise it is as if the Alien had been Feoffee of the Disseisee.

Co. 1. Inst. fol.

278. B.

And though Aliens are enabled by Charter of Denization to a transmission hereditary to their posterity of Lands, yet a Denizen is not capable of Honour, nor a transmission of the same, without Naturalization by Parliament;

Co. 4. Instit.
fol. 47.

Decreed in
the grand E-
state at Paris,
1607.

Vide Monmouth
Hist. of France
fol. 15.

for by the Charter of Denization he is made, *quasi seu tanquam ligens*, but to be a Member of Parliament, he must be *ligens revera, & non quasi*, for by his becoming a Noble-man, he claims the place of Judicature in Parliament, the which he cannot till naturalized by Act of Parliament, and then he may claim as eligible to the same, or any other: And the same Law is at this day in France, where no Foreigner can hold any Honour or Dignity in the State or any part of the Government. 'Tis true, Cardinal *Mazarine*, who was an *Italian*, held a great share in the same, but it was *vi, manu & forti*, and was the occasion of introducing a Civil War in that Kingdom; and yet the late Duke of *Richmond* claimed the Honour or Dignity of a Peer of France, as Lord of *Aubon*, but that was a Title rather annexed to the Tenure of that Seignory than other wife.

And though his Majesty has been pleased to confer the Dignity of Dutcheſs of *Portsmouth* on the Lady *Carwel*, yet the same is rather Honorary than a Title consistent with the Laws of *England*: for though his Majesty is the Fountain of Honour, and may call the meanest of his Subjects to the highest of Dignities, yet it is their Civil qualifications which make them capable of injoying the Immunities and Privileges of Peers, but that flows from another Fountain, even the Law of the Realm, which as to Denizens disables them to take so signal a mark of Sovereignty without Act of Parliament.

C H A P. IV.

Of Aliens and Tryals per medietatem, where allowed, and where not.

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| <p>I. Of the manner of Aliens obtaining Tryals per medietatem, at the Common Law, and of the Antiquity of the same.</p> <p>II. Of the making the same a Law universal wisthing this Realm, as to some persons, afterwards general, as to all.</p> <p>III. Of the Writ, and some Observations on the Summons of such an Inquest.</p> <p>IV. Of the opportunity lost or gained by praying this Immunity.</p> | <p>V. Of the awarding of Tales upon request on such Enquiries.</p> <p>VI. Where this Immunity does not extend in Aliens, and where it does in matters Civil and Criminal.</p> <p>VII. Of the validity of a Witness Alien, and of an Infidel.</p> <p>VIII. The title of a Renegadoe.</p> <p>IX. Of the benefit of the King's Pardon, whether it extends to an Alien, whose abode is here, but happens to be absent at the time of the promulgating.</p> |
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I *Triatio bilinguis*, or *per medietatem linguæ*, by the Common Law was wont to be obtained by Grant of the King, made to any company of Strangers, as to the Society of Lombards, or *Almaignes*, or to any other Corporation or Company; when any of them were impleaded, the moiety of the Enquest should be of their own Tongue; this Tryal *per medietatem* in England is of great Antiquity, for in some cases Tryals *per medietatem* was before the Conquest, *Viri duodecim Jure Consulti, sex Walliæ, totidem Angliæ & Walliæ jure dicanto*, and as the Commentator observes, it was called *duodecim Virile Judicium*. Sanf. Pl. Coron. lib. 3. cap. 7.

II. This Immunity afterwards being found commodious to us *Islanders*, became universal; for by the Statute of 27 E. 3. cap. 8. it was enacted, that in Pleas before the Major of the Staple, if both Parties were Strangers, the Tryal should be by Strangers; but if one Party was a Stranger, and the other a *Denizen*, then the Tryal should be *per medietatem linguæ*: But this Statute extended but to a narrow compass, *viz.* only where both Parties were Merchants, or Ministers of the Staple, and the Pleas before the Major of the Staple: But afterwards in the twenty eighth 27 E. 3. cap. 8.

year of the same King's Reign it was enacted, That all manner of Enquests, which was to be taken, or made amongst Aliens and Denizens, be they Merchants, or others, as well before the Mayor of the Staple, as before any other Justices or Ministers: Although the King be Party, the one half of the Enquest or Proof shall be Denizens, the other half Aliens, if so many Aliens and Foreigners be in the Town or place where such Enquest or Proof is to be taken that be not Parties, nor with the Parties in Contract, in Plea, or other quarrel, whereof such Inquest or Proof ought to be taken; and if there be not so many Aliens, then shall there be put in such Enquests or Proofs as many Aliens as shall be found in the same Town or places, which be not thereto Parties, as aforesaid; and the remnant of Denizens, which be good men, and not suspicious to the one Party or other.

But if it be
for Treason, &
contra. Vide
postea num. 5.

By which Statute the same Custom or Immunity was made a Law universal, although it be in the Case of the King, for the Alien shall have his Tryal *per medietatem*.

Dyer 144.

It matters not whether the moiety of Aliens be of the same Country, as the Alien party to the Action is; for he may be a Dutch man, and they Spaniards, French, Walloons, &c. because the Statute speaks generally of Aliens.

Stat. 18 Eliz.
cap. cro. 3.
part 818. 841.
Bro. tit. Tryal.

III. The Form of the *Venire facias* in this case is, *De Vincet*, &c. *quorum una medietas sit de Indigenis, & altera medietas sit de alienigenis natis*, &c. And the Sheriff ought to return twelve Aliens and twelve Denizens, one by the other, with addition which of them are Aliens, and so they are to be sworn; but if this Order be not observed, it is holden as a misreturn.

Cro. 3. part
381.

It has been conceived of some, that it is not proper to call it a Tryal *per medietatem Linguae*, because any Alien of any Tongue may serve; but that surely is no Objection, for People are distinguished by their Language, and *medietas Linguae* is as much as to say, half English, and half of another Tongue or Nation whatsoever; nor matters it of what sufficiency the Jurors are, for the form of the *Venire facias* shall not be altered, but the clause of *quorum quolibet habeat* 4. &c. shall be in.

If both Parties are Aliens, then the Enquest shall be all English; for though the English may be supposed to favour themselves more than Strangers, yet when both Parties are Aliens,

Aliens, it will be presumed they will favour both alike, ^{21 H. 6. 4.} without any difference.

IV. If an *Alien* is party, who slips his opportunity, and suffers a Tryal by all *English*, the same is not a Verdict *Erroneus*; for if he will be so negligent as to slip that advantage which the Law gives him, it is his fault; for the *Alien*, if he will have the benefit of that Law, he must then pray a *Venire facias per medietatem Linguae*, at the time of the awarding the *Venire facias*: But if a neglect of that opportunity happens, yet if he prays it after the awarding a general *Venire facias*, the same may be retrieved so as it be before the *Venire* be returned and filed, for then he may have a *Venire facias de novo*, or otherwise he cannot, nor can he afterwards challenge the *Array* for this cause, if it falls out the *Juries* are all *Denizens*; though *Sandford* seems to be of a contrary opinion, for the *Alien* must pray it at his peril. ^{Dyer 28. Dyer 144. 21 H. 7. 32. Pl. Coron. 159. Dyer 357.}

V. If there be a general *Venire facias*, the Defendant cannot pray a *decem Tales*, &c. *per medietatem Linguae* upon this, because the *Tales* ought to pursue the *Venire facias*: But if the *Venire facias* be *per medietatem Linguae*, the *Tales* ought to be *per medietatem Linguae*, as if five *Aliens* and five *Denizens* appear on the principal Jury, the Plaintiff may have a *Tales per medietatem*; but if the *Tales* be general *de circumstantibus*, it hath been held good enough, for there being no exception taken by the Defendant upon the awarding thereof, it shall be intended well awarded. ^{3 E. 4. 11, 12. Co. L. 10. fo. 104. Cro. 3. part. fol. 818, 841.}

If an *Alien* that lives here under the protection of the King of England, and amity being between both Kings, commits *Treason*, he shall by force of the Act of 1. and 2. Philip and Mary, be tried according to the due course of the Common Law, and shall not in that case be tried *per medietatem Linguae*. ^{21 Herb. 4. Stamford. 154. Hill. 36. Eliz. Dr. Lopez Case by all the Judges.}

But in case of *Petit Treason*, *Murder*, *Felony*, &c. if he prays his Tryal *per medietatem Linguae*, the Court ought to grant it. ^{Vide Lord Dyer fol. 144. the Case of Sherily}

where the point is fully handled. *Co. Instit.* 3. part. fol. 27.

Yet if an *Information* be exhibited against an *Alien*, the Tryal is not *per medietatem*, but according to the Common Law. ^{Mores 557. Barr's Case.}

If an *Alien in League* bring an action (if there be cause)
the

Colivre Coke's
Entries tit. A-
lien 1.

Stamf. 160.B.

25 Ed. 3. cap. 8.

28 Ed. 3. 13.

2 H. 5. 3.

the Defendant may plead in abatement; but if it be an Alien Enemy he may conclude in the action.

In an action for words the Defendant pleaded Not guilty, and said he was an Alien born, and prayed Tryal *per medietatem Linguae*, which was granted, and at the *nisi prius* in London, but six English men and five Aliens appeared, and the Plaintiff prayed a *Tales de Circumstantibus per medietatem Linguae*, and it was granted, so there wanted one Alien, and the Record was :

Ideo alius Alienigena de Circumstantibus per vic' London, ad requisitionem infra nominati Julii Caesaris, pro mandato Justiciarum de novo apposito, cujus nomen pannelo predict' affilatur secundum formam Statuti, in hujusmodi casu nuper editi & proviso, qui quidem Furato sic de novo appositus, viz. Christianus Dethick Alienigena exactus venit ac in Furatam illam simul cum aliis Furatoribus predict. prius impanellatis, & Furatus fuit, &c. It was found for the Plaintiff, and afterwards moved in Arrest of Judgment, That no *Tales* was to be granted *de Circumstantibus*, when the Tryal is *per medietatem Linguae*, by the Justices of *Nisi prius*, by the Act

Mich. 35. 36.

Eliz. in B. R.

Sir Julius Ce-

sar versus Phi-

lip Corsini.

of 35 H. 8. because in the Act it is spoken of Free-hold of Jurors, and an Alien is not properly said of any Country, or to have any Free-hold; but it was adjudged because the Statute was made for speedy Execution, that it should be expounded favourably, according to the intent and meaning of the Makers of the Act; and though in this case the *Tales* was prayed by the Plaintiff, where it ought to have been *ad requisitionem Defendantis*, yet that should be taken to be but a misprision, and would be amended.

VI. If the Plaintiff or Defendant be Executor or Administrator, though he be an Alien, yet the Tryal shall be by English, because he sueth in *Auter droit*; but if it be averred that the Testator or Intestate was an Alien, then it shall be *per medietatem Linguae*.

Cro. 3. part,
fol. 275.

Shely a Frenchman who joyned with Stafford in the Rebellion, in the taking of Scarborough Castle in the County of York, he being taken, was arraigned in the Kings Bench upon an Indictment of Treason, and the Indictment was *contra legiantiam suam debitam*; and the Indictment was rul'd to be good, although he was no Subject, because it was in the time of Peace between the Queen and the French King. But if it had been in the time of War, then the party

party should not have been indicted, but ransomed. It was likewise rul'd there, that the Tryal was good, although the *Venire facias* awarded in York was general, and not de medietate Linguae; for such Tryal per medietatem Linguae does not extend to Treasons, and the Indictment ought to omit the words, *Naturalem Dominam suam*, and begin that he intended Treason *contra Dominam Reginam*, &c. Hill. 4 Mar. Dyer 145.
36 Eliz. in B. R. Stephano Ferraro d' Game's Case in Dr. Lopez Treason.

If an Alien Enemy come into this Realm, and be taken in War, he cannot be indicted of Treason, for the Indictment cannot conclude *contra legiantiam suam debitam*, for he never was in the protection of the King; and therefore he shall suffer death by Martial Law, and so it was rul'd in 13 H. 7. in Perkin Warbeck's Case, who being an Alien born in Flanders, feigned himself to be one of the Sons of King Edward the Fourth, and invaded the Realm, with intent to take upon him the Dignity; who had his Judgment and Tryal by Martial Law, and not by the Common Law of England.

VII. The Kingdom of Ireland was a Dominion separated and divided from England at the first, and came to the Crown of England by Conquest, in the time of Henry the Second; and the meer Irish were as Aliens, Enemies to the Crown of England, and were disabled to bring any action, and were out of the protection of the Laws of this Realm; and five Scepts of the Irish Nation were only enabled to the Laws of England, viz. O Neil de Ultonia, O Molloghlin de Medja, O Connogbor de Connacia, O Brian de Tholmonio, and Ma Murogh de Lagenia, as appears by the Records of the Dominion of Ireland, and several Grants have been made to the Irish, which proves them to be meer Aliens. But afterwards, though the same was a separate and divided Kingdom, yet whilst they were under the subjection and obedience of the Kings of England, if High Treason had been committed by an Irish man, he might be arraigned, indicted, and tryed for the same within England, and by the Laws of England; and so it was resolved by all the Judges of England in Oruck's Case, 33 Eliz. and also in Sir John Perrot's Case, That Ireland was out of England, and yet that all Treasons committed there, were to be tryed in England, and that by virtue of the Statute of 38 H. 8. cap. 23.
Sir John Davies Conquest of Ireland, fol. 103, 104, 105.
Co. 7. fol. 23. Calvin's Case.
Arthur

Arthur Crobagan, an *Irish* man, was arraigned, for that he being the Kings Subject, at *Lisbon* in *Spain* used these words, *I will kill the King* (innuendo *Dominum Carolum Regem Angliæ*) if I may come unto him, because he is a *Here-tick*; that afterwards he came into *England*, and was taken, and tryed by a Jury of *Middlesex*, and was found guilty; and it was held High Treason by the course of the Common Law, for his Traiterous intent, and imagination of his heart is declared by these words, and within the Statute of 25 E. 3. he confessed he was a *Dominican Fryar*, and Priest in *Spain*.

14 Eliz. in the Case of the Duke of Norfolk, Co. Infit. 4. pt. fol. 279. *Bracton* says, that an Alien born cannot be a Witness; but that is to be understood of an *Alien Infidel*, for the Bishop of *Rosse*, being an Alien born (a *Scot*) was admitted to be a Witness, and sworn.

Yet an *Infidel* may bring an Action against another Merchant, or any other however*, and that without controverſie.

The testimony of a *Renegadoe* is not to be received at this day, by the Laws of any *Christian Kingdom* or *Republick*; he that hath once renounced his Faith can never be believed, therefore he cannot be a Witness; and so it was rul'd where one *Domingeo de la Cardre*, a *Renegadoe*, who was sworn, and gave evidence; afterwards a new Tryal being granted, his testimony was rejected, and he not suffered to be sworn, it being at his Tryal proved, that he was a *Spaniard*, and a *Christian* by birth and education, and after became a *Jew*.

If an *Alien* be resident, and commits an offence, he shall have the benefit of the Kings general Pardon; but if he is not in the Kingdom at the time of the Pardon promulgated, then he loses the benefit of the same; for he is no otherwise a Subject, but by his residence here.

Hobart, fol. 271. *Courten's* Case.

Hill. 17, 18. Car. 2. in B. R. *Robles versus* Langston.

C H A P. V.

Of Planters.

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| <p>I. Of Possession, and its original right.</p> <p>II. Of Vacancies natural, which give a right to Planters.</p> <p>III. Of Civil Vacancies, how far the same may be possessed.</p> <p>IV. Of Persons expelled, whether just to deny such to plant in places vacant.</p> <p>V. Of Planters, whether they have a firm right, so as to dispose by Will, or only a Usufructuary possession.</p> <p>VI. Of Planters, wanting things necessary for the support of humane life, generally considered according to the Laws of Nature.</p> <p>VII. Wherefore one man may natu-</p> | <p>rally have more than another, and what conditions are annexed to such fortunes, for those that are in necessity.</p> <p>VIII. Whence it is that there was at the beginning, and is still at a cise condition of re-assuming our Original rights, in case of extreme or natural necessity for natural Community.</p> <p>IX. Of necessity considered in a Christian Community.</p> <p>X. Of the Primitive Communion, considered in reference to its restrictions and limitations.</p> <p>XI. Of those things that are dedicated to God, and holy use, whether subject to the relief of our necessities.</p> |
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I. **H**AVING in the first Chapter of this Book discoursed of the Original of Property deducing its inception, to that which we call possession, or *meum*, and how the same may be altered by War; it may not seem unnecessary to discourse of the acquiring of Property in the new discoveries of those vast immensities of *America*, which being prepossessed, seem to deny us legally that title which we pretend to.

Possession by Law, is esteemed the highest title that men can pretend to what they enjoy, which is nothing else but *positio pedis*; as if the Ancients had no other seal to confirm their Tenures, but the prints of their feet: and good reason, seeing the mind is not able to take up a place so well as the body; for many mens wills may concur in (wishing and liking) the same thing, but many bodies cannot concur to the possessing it: Besides the mind cannot set an outward mark on what it likes, that thereby others might be warned to abstain from it, all which the body properly doth. *Abraham* and *Lot* going to plant, declared

Ascham. fol. 151

declared no more than this, *there was room or vacancy enough*; and therefore, without further examination or scruple, they knew they might turn to the right hand or to the left, to possess what they would to themselves.

II. This Vacancy, which gives us a right to plant, is to be considered in two respects, 1. Natural, 2. Civil: the first is in things which may be possessed, but actually are not, neither in property, nor use; such a Vacancy which is *nullius in bonis*, might be occupied by *Switzers*, who, as *Cæsar* saith, would fain have changed their rough Hills for some nearer *Campania*; and Desarts or places uninhabited may be possessed and appropriated to the first Planter, and that without all controversie, but especially by those who being expulſed from their own Seats or Estate, seek entertainment abroad: The *Ansebarians* in *Tacitus*, cry out, *As the Heaven to the Gods, so is the Earth granted to Mortals, and what is void is publick*: Looking up to the Sun and Stars, they did openly as it were inquire of them, *Whether they were pleased in beholding any ground empty, and without Inhabitants, they should rather cast forth the Sea, and overwhelm the Spoilers of the Earth.*

Tacitus Annal.
13.

*Ubi nec possessio
est plene in ho-
mine, nec homo
plene in posses-
sione.*

III. Civil Vacancy, is where it is not absolutely incorporated, as among the roving *Arabians* and *Moors* in *Barbary*, and other *Africans* and *Americans*, who possess one place to day, and another to morrow; these by their frequent returns, shew that they abandon not the places they remove from, as *derelicta quæ quis in bonis amplius numerare non vult*; we cannot say, that their natural or voluptuary interest in them is no way improved; for *Grotius* seems to be of opinion*, That if there be some Desert or barren ground, the same ought to be granted to Strangers upon their request, and, says he, *It is also rightly seized on by them, giving this reason, For that Lands ought not to be esteemed occupied which are not cultivated; but only, as to the Empire, which remains entire to the first People, they do no offence who inhabit, and manure a part of the Land that lyes neglected*†.

* *De Jure Bel-
licæ Pacis, lib.*
2. cap. 2. §. 17.

† *Dion. Pruse-
ensis, Orat. 5.*

But we must press this Argument of *Grotius* very tenderly, lest by the same reason others conclude, that those Estates which are not competently improved, are derelict and occupiable by others, which would introduce perpetual confusions, and easily perswade every man that he could

could husband his Neighbours Lands better than himself: However this is a clear case for all Planters, that those wastes, or *aspera montes*, which the Natives make no use of, nor can receive any damage by their being possessed by others, may lawfully be impropriated by them.

IV. Again, if a Nation or People should happen to be expelled out of their own Country, desire to seek void places, or at least such as might not absolutely endamage a People into whose Territory they come, they may justly plant; the reason is, for that Dominion or Property might be introduced with a reception of such use which profits such distressed people, and hurts not those; and therefore the Authors of Dominion are supposed willing rather to have it so; but to give away that which we have but a bare right to and no possession, can neither be just in the giver, nor lawful in the receiver. We have an eminent Example of this amongst the *Turks*; for the *Tartars* having over-run the North of *Asia*, and many Nations fled from their own Countries for fear of them, amongst other the *Corasines*, a warlike People, being thus unkennelled, they had their recourse to the *Sultan* of *Babylon*, and petitioned him to bestow some habitation upon them; their Suit, according to the Rules of Policy, he could neither safely grant nor deny; to admit them to be Joynt-tenants in the same Country with the possessed *Turk* would turn to a present inconvenience and a future mischief, and to deny them might perhaps edge their discontents into desperateness; therefore instead of giving them Gold, he sent them to the Mines, yet so as they took it as a very great courtesie; for he bestowed on them all the Lands which the Christians held in *Palestine*, liberally to give away what was none of his, and what the others must purchase before they could enjoy: Sad was the donation; for by the virtue of that Conveyance they became Conquerors of *Jerusalem*, and of the whole strength of the Christians.

V. But admitting that Planters may appropriate a Plantation for their living, whether such may dispose of the same by Will (we supposing the Possessor having no Heir) for that he might seem to have but an usufructuary possession, till a descent had been cast, which then perhaps may turn the same into a Right †: Without all controversie the very immediate possessing and planting creates a right against all,

Reste facta est concessio, quæ est sine damno alterius.

Bald. 3. Conf. 293.

** Serv. ad 7. En. Littusq; rogamus innocuum, cujus vindicta, ait, nulli possit nocere.*

Matthew Paris, fol. 851.

Matthew Paris fol. 834, 835.

† As it is consonant to Nature that my

share of subsistence, which was before uncertain, should now be fixed, so it is necessary that the consent which others gave to this at first, should stand fixed, especially if there was no obligation, or declaration at the first to the contrary. *Vide Selden de Jure Nat. & Gen. ad men. Heb. id obligat. quod est ex officio quod legis est*: But the sanction of a Law supposes the nullity of a state of nature, not of a right of nature.

VI. Again, Persons having arrived in those Territories, and planted, but before they have reapt the fruits of their labour, necessity is found within their Huts, and a supply of things for the support of humane life is wanting, whether such may seek the means of subsistence by the Laws of Nature, and in case of refusal (after request) force them from their Neighbour Planter? Surely that which is necessary for any natural subsistence, and necessary to another, belongs justly to me, unless I have merited to lose the life which I seek to preserve. There were a defect in Gods creating our natures, such as they are, if he did not provide means to uphold their beings, according to the natural faculties which he hath given them. A good Mother divides her bread among her Children, so as a morsel may come to each; let us therefore judge this case by those rules of Justice, by which we judge other cases: if a Father in his Will pass by a Child or names him, but upon false causes leaves him nothing, he is notwithstanding by the equity of the *Civil Law* admitted to a Childs part, a *legitima*, and may form his *Action contra Testamentum inofficiosum*. Men are all a Kin, and we derive one from another, and to let others settle in our places, who may justly expect as much due to them, for their natural subsistence, as was to those who before went out of the World, to make place for them, yea though they assign them nothing at their departure.

Man were of all living Creatures most miserable, if he might not during this life have that measure, which God would not have an Ox defrauded of; thus hath every Dunghil-fly a right to live, and to remain insectile, which besides

*Pia mater pa-
nem inter libe-
ros distribuit,
ut fructus ve-
niat singulis.*

besides existence hath sense, and may not justly be deprived of that its chiefest felicity, unless it be importunate to a nobler Creature.

VII. 'Tis very true that no man can pretend to share in the Sweat of another man's Brows, or that the Pains and wasting of another man's life should be for the maintenance of any but his own; nay though it be granted, that those Neighbour-planters, who being settled before us, and having acquired either by Industry, or lawful donation, the fruits of other mens labours, and consequently must enjoy more Plenty than a new Comer or Planter, yet all that they possess is not properly theirs; for if another by extreme necessity be perishing, and they have above what they can consume in a natural way, then they have no fuller a property in that plenty than Stewards have, and for this regard they are so called in Scripture: *The earth still is the Lords, and the fulness of it is his, for he made it of his own matter, and for the fashion of it used not our aid; yea, 'tis his Sun which still produces, and his Clouds which drop fatness*: We can only pretend the contribution of a little pains for that which is our natural share; so that in plain reason we may not expect to be otherwise qualified than Stewards, for all that which is not probably necessary for our own subsistence, or for theirs, who subsist only by us: Wherefore Lazarus ready to perish (not by fault, but by misfortune) had taken Drives his Crums, contrary to his will; yet he had not sinned no more than he who takes something which the Lord or Master hath given him, though the Steward contradict it: But if it so happen, that both the Planters are *in pari necessitate*, then *melior est conditio possidentis*; or as S. Paul's words are, when he excited the Churches Charity and Alms, for the Relief of the distressed Members of Christ, *Not* (quoth he) *that we should be Strained, and they abound.*

VIII. The will of those who first consented mutually to divide the Earth into particular possessions, was certainly such as receded as little as might be from natural equity; for written Laws are as near as possible may be to be interpreted by that; and therefore in cases of such extremities we are not without examples, of taking the Goods of one to supply the necessities of many: And therefore at Sea, if Provisions begin to fail in a Ship, every one may befor-

Xenophon in his Answer to the Cynopenes: Ubi jus emendi nobis non conceditur, sive in Barbarico, sive in Græcico solo ubi que opus sumimus, non per vim, sed ex necessitate. Exped. Cyri.

Lessius, lib. 2. cap. 12. dub. 12. num. 70.

2 Cor. 8. 13.

Grotius de Jure Belli ac Pacis, lib. 2. cap. 2.

*Leges humane
obligant uti fa-
cte sunt, scili-
cet cum sensu
humana imbe-
cillitatis.*

ced to bring out openly, what he laid in for his passage in particular; so a Ship at Sea, having in stress of Weather, spent her Sails, Cordage, and Anchors, meeting other Vessels at Sea, may take a supply of such as shall be wanting; but yet governed according to *S. Paul's* words, *So that such taking straitens not the other Ship.* So when the Sea breaks in upon a Country, we may dig in the next mans grounds to make a bank, without staying for the Owners permission, yea, tear down any man's hedge, or fence, when the common passage is stopped: For in such cases of necessity humane Laws (as is mentioned afore) do not so much permit as expound their natural equity, and that which men give to those who are so innocently distressed, who borrow life only from the shadows of death, *Et pista se tempestate tuentur*, is not properly a Charity to them as a duty; and if he be a Christian that gives, perhaps he doth more Charity to himself than to the Receiver.

IX. The reason of this Christian Charity or Communion, is as far above the natural, as Christ himself was above Nature; this requires an equal beating of all pulses, that as Fellow-Members we have a *homogeneous* sense and palpitation; we are to divide a Cruse of Oyl, and a few handfuls of Meal, with one of Christs Flock, with an abandoned Creature; and what can be in more extremity than a poor Planter in a strange place, destitute for the present supports of humane life?

And surely the violation of this *Jus Charitatis*, is no less than theft in those who having extended fortunes, never defalcate a *Gibeonites* Crust perhaps for a wandering Angel, these steal even the shipwrack'd man's picture from him, which as his whole inheritance he carried at his back, to move compassion, and by the insatiable Sea of their Avarice and Luxury, they wreck him over at Land.

X. But this free primitive Communion had, and hath its bounds, and its *quantum* in Contributions, as well as the natural, otherwise it might be fraudulent, and thieving: For they who possess but a little, would contribute it all, on purpose to share equally with those who possess very much, which would introduce a visible decay and ruine in all; as *Tiberius* rightly observed * on *M. Hortals* his petitioning an Alms for *Augustus Cæsar's* sake, *Idleness would increase, and Industry languish, if men should entertain*

* *Intenditur,
inquir, socordia,
languescet in-
dustria, si nul-
lus ex se metus
aut spes, & se-
curi omnes ali-
ena subsidia
expectabunt,
sibi ignavi, &
nobis graves.
Tacit.*

no hope, nor fear to themselves, but securely expect other mens relief, idle to themselves, and burdensom to us.

Wherefore in the midst of that primitive Communion, we find that the Apostles went *domatim*, from house to house breaking of bread, therefore they even then retained by their houses in property; which property is supposed by the eighth Commandment, as well as it is by Christian Charity: For no man can steal, but by invading the right of another; and as for Charity, it is necessary he have something of his own, to be able to fulfil its commands, and to make a dole at his door; and it is very convenient that he give it rather with his own hand, than by some publick Collectors, *For Charity is hated most with the sense of its own action.* Moreover under the Law, Jews were commanded to love one another as themselves; yet this Command took not away property then, therefore it takes it not away now; notwithstanding we own the use or usufruct of our properties to the distressed, though our selves be at the same time in distress; just as we are commanded, by the peril of our own lives, to endeavour to secure our Neighbours life, which is yet a Charity more transcendent than the other, by how much life is above a livelihood. And though the various Laws of Countries have variously provided punishment for those, who out of meer necessity take something out of anothers plenty; yet that proves not the act to be sin, or repugnant to equity or conscience, but rather repugnant to the conveniency of that Kingdom or Republick where the act is committed; and the true reason of the same is, lest thereby a gap might be laid open to Libertinism; besides Reason of State, we know, considers not vertue so much as publick quiet and conveniency, or that right which is *ad alterum*.

Mat. 7. 11.

XI. We will now consider those things which are Gods, which yet are not his in such a strict rigorous sense, but that they lie open to the exceptions of our just necessities, hence that which is devored as a Sacrifice to him, in case of necessity, may be made our dinner, witness the action of David: Wherefore the consequence of our Saviour's Answer was very strong, when he defended his pulling the Ears of Corn in anothers Field: That if it was lawful for David in his necessity to eat that bread, which was provided for the Table of God, then how much more was it

Decretals of
Gratian, lib.
Synodus Nice-
mensis, Can.
Synodus Aure-
liacensis, 1.
Can. Concilium
Toletanum.

lawful for him and his Apostles in their necessities to take a refreshing out of that which belonged to man? By the *Canon Law*, if no other means can be found, the Vessels of the Altar may be sold to redeem those Souls who are enthralled in misery and *Captivity*; and is there not good reason for it, seeing they serve but for the Souls of Men, and therefore the Souls of Men are more precious than they? Yea the Sacrifice it self, to what end is it, but to obtain a state of piety for us?

Grotius de Jure
Belli ac Pacis,
lib. 2. cap. 2.
§. 8, 9.

Upon what hath been said, it may not seem an injury, if a Planter (wanting those things for the support of humane life) requesting a reasonable proportion of his Neighbour (having it to spare) with an intention to repay, if denied, by force take the same from him; for that reason which creates a punishment in a settled Commonwealth for the like actions, does in such places fail.

CHAP.

C H A P. VI.

Of the Jews.

- I. *Of Considerations touching their various and several Forms of Government down till their total extirpation.*
- II. *Of their first coming into England, and when.*
- III. *Of their state and condition after their inhabiting here.*
- IV. *Of their Privileges and other Immunities in reference to their Monies and Charters.*
- V. *Of their Chests and Stars, and the manner of proceedings for the recovery of their debts.*
- VI. *Of their Charters and Immunities, and of the confirmation of the same.*
- VII. *Of the consequences and inconveniences that fell and were occasioned by reason of their Courts, as to the Ecclesiastical Cognizance.*
- VIII. *Of their power in erecting of Synagogues, and of the foundation of the House of Converts, now called the Rolls.*
- IX. *Of their Charter obtained of the Priesthood of all the Jews of England.*
- X. *Of places totally exempted in England from their Society.*
- XI. *Of the Endowment of their Wives according to the Laws of the Jews, and of their power of Excommunication of each other.*
- XII. *Of the real state and condition that they remained in, notwithstanding all their various and several immunities.*
- XIII. *First, in reference to their persons, being obliged to wear Badges or Tables on their Breasts, as notes of distinction, and having entred the Realm, could not depart without licence.*
- XIV. *Secondly, as to their Estate, the same being solely at the will of the King; for at their death the same escheated, they could sue without leave or licence, the King might respite or release the same, and have nothing but what was solely at the devotion of the State, continued so till their total banishment out of the Realm.*

I **S**ince the remainder of that mighty Nation, which of old were elected a People peculiar, are now by him that first chose them dispersed over the face of the Earth, and are become the most politick of Traders now extant, having by their industry cemented themselves into the principal Revenues and Traffick of the Universe, but more especially among those Nations who remain in darkness and in the shadows of death. It might not seem improper to examine how their condition stood of old in this Nation, what advantages and disadvantages they brought to this Realm, and how the Laws of the same stand in reference to that People at this day.

At the first the Fathers of their several Families, and their first-born after them, exercised all kind of Government both Ecclesiastical and Civil, being both Kings and Priests in their own houses, they had power over their own Families to bless, curse, cast out, disinherit, and punish with death, as is apparent by *Noah* towards *Cham*, *Abraham* towards *Hagar* and *Ismael*, *Jacob* towards *Simeon* and *Levi*, &c. In *Moses's* days then did this Prerogative of Primogeniture cease; and as *Aaron* and his Posterity were invested with the right and title of Priests, so *Moses* and *Joshua* governed the People in a kind of Monarchical Authority.

*Aug. de Civit.
Dei, lib. 18.
cap. 22.*

After *Joshua* succeeded Judges, their Office was of absolute and independent Authority, like unto Kings when once they were Elected; but there were long vacancies and chasmes (commonly) between the cessation of the one, and the Election of the other, yea, for the most part they seldom chose a Judge but in the time of great troubles and eminent dangers, which being over-past, he retired to a private life, much symbolizing with the *Roman* Dictators, and continued with them according to the computation of some 329 years. In the vacancies or distancies of time between Judge and Judge, the greater and weightier matters were determined by that great Court of the Seventy called the *Sanhedrim*, in which respect the Form of Government may be thought Aristocratical; Kings succeeded the Judges, and they continued from *Saul* to the *Captivity*, that is about 500 years.

Usher.

From the *Captivity* unto the coming of the *Messiah*, which is thought to have been 536 years, the State of the *Jews* became very confused, sometimes they were ruled by Vice-gerents, who had not Supreme Authority in themselves, but as it pleased the *Persian* Monarchs to assign them; they were called *Heads of the Captivity*, of which was *Zorobabel* and his Successors down to *Hosodias*, which were thought to have been of the Posterity of *David*; so likewise the other succeeding ten chief Governours under *Alexander the Great*, in the last of those ten Governments departed from the House of *David*, and was translated to the *Macchabees*, who descended from the Tribe of *Levi*, and from them the Sovereign Authority continued to *Herod the Askalonite* his Reign, at which time our Saviour Christ

was

was born according to *Jacob's Prophecy*: *The Scepter shall not depart from Judah, nor a Law-giver from between his feet until Shilo* (that is, the *Messiah*) *shall come*; which Scepter was given to *Judah*, that is, to the *Twelve Tribes* from the time of *Moses*, and that it was taken fully from them in *Herod's* time, and given to him who was a * *Pro-* * A Jew is a
selyte, and no ways descended from that holy stock, for
 such was *Herod*. *fession, not of*
Country or

Their condition since the extirpation of their Commonwealth, and their dispersing over the face of the whole Earth, after the sacking of their Metropolis, is fully related by *Josephus*, *Eusebius* and others, and what condition, and how used in most Nations they have been since then, is fully illustrated by *Helyn* in his *Microcosm*. *Nation. Joseph. Scaliger ex quo Casaubon. adu. Baron. pag. 19, & 39.*

II. When they came first into this Realm is not certainly related by any of the Historians in their Writings of the *British* or *Saxon* Kings Reigns; however this certainly appears, that *William the Conqueror* translated the *Jews* in *Holinsbed. Vol. 3. pag. 15.*
Roan, from thence to *London* ob numeratum pretium, for a summ of Money given by them to him, who accordingly appointed them a place to inhabit and trade in, which being assigned them, they were under the Protection and Patronage of the King, and as his meer Vassals, their persons and Goods being his alone, and that they could dispose of neither of them without his Licence; and this appears by that ancient Law related by *Sir Henry Spelman*. *Concil. 623.*

De *Judeis* in Regno constitutis.

Sciendum est quoque, quod omnes *Judæi* ubicunque in Regno sunt, sub tutela & defensione Domini Regis sunt; nec quilibet eorum alicui diviti se potest subdere sine Regis licentia, *Judæi*, & omnia sua Regis sunt. Quod si quisquam detinuerit eis pecuniam suam, perquirat Rex tanquam suum proprium, (or detinuerit eos, vel pecuniam eorum, perquirat Rex, si vult, tanquam suum proprium) as *Sir Henry Spelman* renders it. *Spelman Concil. 623.*

III. These people after they had planted themselves in this Isle, and being thus protected, drove on the Trade and Traffick of the same with a mighty hand to such a height, that by the end of King *Rufus's* time, they became

Job. Brompton,
Col. 1048.

Gervasius Do-
robernenfis in
his Chronica,
Col. 1403.

Fox Vol. 1.
fol. 305.

Matthew Pa-
ris, fol. 641.
Rot. Pat. 41
H. B. m. 4.
mun. 6. Col.
4. Instit. fol.
254.

Job. Brompton
Collect. 1258.
Hollinshead, Vol.
3. pag. 155.

powerful, rich and numerous, and to that degree so zealous for their Religion, that they not only held open Disputes, but endeavoured to bring over by Monies the poor and needy to be of their opinion. So high and insolent were they grown up in a shorttime, which continued till King Henry the Second's Reign, at which time their condition became a grievance to the Nation by reason of their Oppressions, Murders, and Insolencies, which that King taking into consideration, banished the wealthiest of them, and the rest he fin'd at 5000 Marks. The most pernicious act of Murder which they were accused of, was, That Generally on a Good Friday they would, if possible, get a Child of Christian Parents, and crucifie him in derision of his Religion.

IV. King Richard after his return from the Holy Land, taking into consideration the necessities and straits that that expensive Expedition had reduced him, and being desirous to reduce the Monies and Estates of the Jews into such a condition, as if necessity should compel him to seize on the whole; but before the same could be done, it was propounded that the King declaring his being sensible of the state and condition of the Jews, a mean might be found out for the settling and peaceable driving of Commerce between the Christians and them; whereupon Judges were appointed to hold Courts touching the Government of the Jews, and their Commerce was appointed out in these words:

All the Debts, Pawns, Mortgages, Lands, Houses, Rents and Possessions shall be registred, the Jew who shall conceal any of these, shall forfeit to the King his body, and the concealment, and likewise all his Possessions and Chattels, neither shall it be lawful to the Jew ever to recover the concealment; also six or seven places shall be provided, in which they shall make all their Contracts, and there shall be appointed two Lawyers that are Christians, and two Lawyers who are Jews, and two legal Registers, and before them and the Clerks of William of the Church of S. Maries, and William of Chimilli shall their Contracts be made, and Charters shall be made of their Contracts by way of Indenture, and one part of the Indenture shall remain with the Jew sealed with his Seal, to whom the money is sent, the other part shall remain in the Common Chest, wherein shall be three Locks and Keys,

Keys, whereof the two Christians shall keep one Key, and the two Jews another, the Clerks of William of St. Maries Church and William of Chimilli shall keep the third; and moreover there shall be three Seals to it, and those who keep the Seals shall put the Seals thereto. Moreover the Clerks of the said William, and William shall keep a Roll of the Transcripts of all the Charters, and as the Charters shall be altered, so let the Roll be likewise; for every Charter there shall be 3 *d.* paid, one moiety thereof by the Jew, and another moiety by him to whom the moiety is sent, whereof the two Writers shall have 2 *d.* and the Keeper of the Roll the 3 *d.* and from henceforth no Contract shall be made with, nor any payment made to the Jews, nor any alteration made of the Charters but before the said persons or the greater part of them, if all of them cannot be present, and the aforesaid Christians shall have one Roll of the debts and receipts of the payment which from henceforth are to be made to the Jews, and the two Jews one, and the Keeper of the Roll one. Moreover every Jew shall swear upon his Roll, that all his Debts and Pawns, and Rents, and all his Goods and Possessions he shall cause to be enrolled, and that he shall conceal nothing, as is aforesaid; and if he shall know that any one shall conceal any thing, he shall secretly reveal it to the Justices sent unto them, and that they shall detect and shew unto them, all falsifiers and forgers of Charters, and clippers of Monies, when and where they shall know them, and likewise all false Charters.

V. This Chest was called *Arca Chirographica*, or *Chirographorum Judaeorum*, and the Notaries and Registers of them stiled, *Chirography Christiani* and *Judaei Arcae Chirographicae* London, Oxon. or other such City where such Chests were usually kept, all their Deeds, Obligations, and Releases were usually called *Stars* and *Starra*, *Star-rum*, *Star* in our Latine Records, from the Hebrew word (as Mr. Selden observes) *Shetar* (contracted by the omission of *He*) which signifieth a Deed or Contract. These Stars were for the most part writ in the Hebrew Tongue alone, remained with the Stars of that City, and not so called, as is mentioned Co. 4. Inst. 66. Some of them are now extant in the Treasury of the Exchequer in King Johns Reign.

See Purchas's Pilgrimage, l. 2. c. 10. §. 7.

It's conceived the Star-Chamber was the old Receipt where the Chest for Westminster

or else in Hebrew on the one side or top of the Parchment, and in Latin on the other side or bottom of the Deed after the Hebrew.

Vide Fine
Rolls 6 *Johan.*
m. 17. and
likewise in *H.*
3. & *Ed.* 1.

* Fines 9. *Joh.*
memb. 5.

Pat. pars 2.
An. 3. *Hem.* 3.
m. 1.

If any Christian, became indebted to any *Jew* by such *Star* or Writing put up and reserved in his Chest, and paid not his Money at the day appointed, together with all the Interest where any Interest was reserved, then he sued forth Letters by way of Process against him both for the Debt and Interest under the Notaries or Registers hand, to appear before the Justices especially appointed for the Government and Custody of the *Jews* to recover the same; but yet such *Jew* could not obtain such Licence till he had paid a Fine to the King for the obtaining of such Letters, *unum Basantum, viz. Besantum* for every pound, and such *Stars* were in the nature of Judgments, upon which extents were sued forth, and the Lands of the Debtors were seizable notwithstanding, in whose hands soever they came, after the *Star* was entred into *: And if it happened, that any persons denied their Deeds, or any Controversie did arise upon which there was any Tryal, the same was by a Jury half of Christians, and the other of six legal *Jews*.

Such *Stars* or Chest-Judgments were assignable to Christians, together with the extents upon them, and the Assignee might vouch over the Assignor to Warranty in such case. So likewise to the King they might assign over Debts to pay their Taxes.

VI. As this Politick Prince had provided this mean for the discovering of their Estates, so did he from time to time award Commissions to Justices for the Tryal of Causes and Controversies that arose between Christian and *Jew*, and granted them divers Liberties and Privileges, which afterwards were confirmed by these two ensuing Charters of King *John*.

Chart. 2. *Joh.*
n. 49. *Charta*
Judeorum An-
glia.

JOhannes Dei gratia, &c. Sciatis nos concessisse omnibus *Judeis Angliæ & Normaniæ*, libere & honorifice habere residentiam in terra nostra, & omnia illa de nostri; & omnia illa quæ modo rationabiliter tenent in terris & feodis, & vadis & akatis suis: & quod habeant omnes libertates & consuetudines suas sicut eas habuerunt tempore predicti Regis *H.* *Abi patris nostri*, melius & quietius

rius & honorabilius, Et si querela orta fuerit inter Christianum & Judæum, ille qui alium appellaverit ad querelam suam dirationandam, habeat Testes, scilicet legitimum Christianum & Judæum. Et si Judæus de querela sua Breve habuerit, Breve suum erit ei testis. Et si Christianus habuerit querelam adversus Judæum sit iudicata per Pares Judæi. Et cum Judæus obierit, non detineatur corpus suum super terram, sed habeant homines pecuniam suam & debita sua, ita quod mihi non disturbetur, si habuerit heredem qui pro ipso respondeat & rectum faciat de debitis suis & de forisfacto suo; Et liceat Judæis omnia quæ eis appozata fuerint sine occasione accipere & emere, exceptis illis quæ de Ecclesiæ sunt & panno sanguine lento. Et si Judæus ab aliquo appellatus fuerit sine teste, de illo appellatu erit quietus solo Sacramento suo super librum suum, & de appellatu illarum rerum quæ ad Coronam nostram pertinent, similiter quietus erit solo Sacramento suo super Rotulum suum. Et si inter Christianum & Judæum fuerit dissensio de accommodatione alicujus pecunie, Judæus probatum Catallum suum, & Christianus lucrum. Et liceat Judæo quiete vendere vadum, postquam certum erit, cum illud unum annum & unum diem tenuisse. Et Judæi non intrabunt implacitum, nisi coram Nobis, aut coram illis qui Turres nostras custodierint, in quorum Wallibus Judæi manserint. Et ubicunque voluerint, cum omnibus Catallis eorum sicut res nostræ propriæ, & nulli liceat eos retinere, neque hoc eis prohibere. Et præcipimus quod ipsi quieti sint per totam Angliam & Normaniam de omnibus Consuetudinibus & Theolonis & modiatione vini sicut nostrum proprium Catallum. Et mandamus vobis & præcipimus quod eos custodiatis, & defendatis, & manu-teneatis, & prohibemus nequis contra Chartam istam de his supradictis eos in placitum ponat super forisfacturam nostram, sicut Charta Regis H. Patris nostri rationabiliter testatur. Teste T. Humf. filio Petri Com. Essex. Willielmo de Herefcal. Com. de Pembr. Henr. de Bohun Com. de Hereford. Robert de Turnham, Willielmo Brywer. &c. Dat. per manum S. Well. Archidiacon. apud Marleberg, decimo die Aprilis, Anno Regni nostri secundo,

Chart. 2 Joh. n. 53 confirmatio Judeorum de Libert. suis.

JOhannes Dei gratia, &c. Sciatis nos concessisse, & presenti Carta nostra confirmasse Judæis nostris in Anglia, ut excessus qui inter eos emerlerint, exceptis hijs qui ad Coronam & Justiciam nostram pertinent, & de morte hominis & mahemio, & de assaltu præmeditato, & de fractura domus, & de raptu, & de Latrocinio, & de Combustione, & de Thesauris, inter eos deducantur secundum Legem suam, & emendentur, & Justiciam suam inter seiplos faciant. Concedimus etiam eis, quod si quis eorum alium appellaverit de querela quæ ad eos pertineat, Nos neminem compellemus ad testimonium cuiquam eorum contra alium exhibendum, sed si appellator rationabilem & idoneum testem habere poterit, eum secum adducat. Si quod vero opus sceleratum & apertum inter eos emerlerit quod ad Coronam nostram vel ad Justiciam pertineat; sicut de prædictis Placitis Coronæ, licet nullus eorum noster appellator fuerit, Nos ipsam querelam faciemus per Legales Judæos nostros Angliæ inquiri, sicut Charta Regis H. Patris nostri rationabiliter testatur. Teste G. filio Petri Com. Essex, Willielmo Pareschallo Com. de Pembr. Hen. de Bohun Com. de Hereford, Petro de Pratell. Roberto de Turnham, Willielmo de Waren, Hugo de Nevil, Roberto de Veteri Ponte. Dat. per manum S. Well. Archidiacon. apud Merleberg decimo die Aprilis, Anno Regni nostri secundo.

Cok. 4. Instit. fol. 254.

VII. This Court being thus erected for the Government of the *Jews*, under the colour of the same there were many evasions found out to avoid the punishments which they justly acquired for their several delinquencies; and therefore when any of these *Jews* were convicted before any of the Ecclesiastical Judges for offences against an Ecclesiastical person, or for Ecclesiastical things, or for Sacrilege, or for laying of violent hands upon a Clerk, or for Adultery with a Christian woman, the Conusance of the cause was always avoided by the Kings Prohibition, because (as was alledged) they had their proper *delegated Judges* who should and ought to have Conusance of such things; so that if a *Jew* happened to be convented before the Judges assigned for such things, upon denial of the same by the person alone, the simple assertion of another

Matthew Paris additamenta, fol. 202, 207.

Jew

Jew and of one Christian without the administering of any Oath, they might have purged themselves, the proof of the Prosecutor being utterly rejected.

VIII. By the *Canon Law* no *Jew* could build or erect a Synagogue; for if they did, the same was seizable into the Crown: the like was so done in the Year 1231. when they had erected and new built a curious Structure for a Synagogue, the same was taken into the Kings hand*, and dedicated to the *Blessed Virgin*, and afterwards granted to the Brethren of St. *Anthony* of *Vienna*, and called St. *Antonies* Hospital; but yet an old Synagogue they might repair.

Decret. Gratian lib. 5.

Surium Concil. Tom: 3. p. 726.

* *John Stows Chron. fol. 182.*

† *Decret. Gratian. lib. 5.*

King *Henry* the Third finding that many of the *Jews* were converted to the Christian Faith, but yet were notwithstanding persecuted by their Brethren, erected a convenient House and Church, with all necessary accommodations, and called it by the name of the *House of Converts*, in which place, if any would live a retired life, they had all accommodations granted them for their lives, which place continued a House of Alms and Receptacle for the converted *Jews* constantly down till 18 *Ed. 3.* and then there proved a failure of such Converts, and the place became empty and ruinous; whereupon that Prince in the eighteenth year of his Reign granted the same House to other poor people who had nothing to live on, with the benefit and accommodation of the Gardens and other things, and an alms of 1 *d.* a day out of the Exchequer to each poor person: which place one *William de Bunsfal* being made Guardian of, and likewise at that time Master of the Rolls, afterwards obtained of that King to annex the same House and Chappel of the Converts to the Master of the Rolls and his Successors for ever.

Matthew Paris Hist. Angl. fol. 393.

Conceived to be the Rolls in Chancery-lane.

51 E. 3. m. 20.

The Constitution of this Society (when it was in being) was pursuant to the *Canon Law*; for by that it was decreed, reciting: That in regard the companies of evil men do oftentimes corrupt even the good, how much more then those who are prone to vices? Let therefore the *Jews*, who are converted to the Christian Faith, have no further communion henceforth with those who still continue in their old Jewish Rites, lest peradventure they should be subverted by their Jewish Society. Therefore the decree, That the Sons and Daughters of

4. *Concil. Toledo, Can. 59, 61, 62.*

Grat. Dist. 28. qu. 1. c. 29. c. 1.

of those Jews who are baptized, and that do not again involve themselves in the Errours of their Parents, shall be separated from their company, and placed with Christian men and women fearing God, where they may be well instructed, and grow in Faith and Christian manners. And further by the same Council it was decreed. That if a Jew should have a Wife converted to the Faith, they should be divorced, unless upon admonition the Husband would follow.

Rot. 1 Reg. Johannis, part 1. m. 28. Chart. 17. Vide Co. 2. Inst. fol. 508. the same at large.

IX. However these people having got footing for their persons, soon obtained Licence notwithstanding against the expresse Canons, not only for the erecting of Synagogues, but also obtained a Charter whereby was granted to one James of London, a Jewish Priest, the Priesthood of all the Jews throughout all England, to have and to hold it during his life freely, quietly, honourably and intirely, without molestation, trouble, or disturbance by any Jew or English man in the exercise thereof, &c. And in the very close of the same there is also granted, That he should not be impleaded for any thing appertaining to him but only before the King himself or his Chief Justice. This Charter was made at Roan from whence the Conquerour first transplanted these people into this Realm.

Claus. 18 Hen. 3. m. 16. Vide Chart. 18 H. 3.

X. And though they obtained footing in most of the great places of England; yet some there were who obtained such favour as to be exempted of their Company, as New castle, to which Corporation it was granted, That no Jew from thenceforth should remain or reside in their Town during the Reign of King Henry the Third or his Heirs; so likewise they of Southampton, Winchelsey, Wicomb, Newberry, Berkhamsted, and other places.

Claus. 5 H. 3. m. 17. de dom. Judeorum.

If a Jew dyed and left an Infant, the House did escheat to the Crown, until the same was redeemed by the Heir at full Age, and in the interim the King might grant the same till he came of Age, together with all his Goods, Chattels, Lands, Tenements and Hereditaments, and then upon payment of their Fines they had a special Writ of Restitution awarded to give them actual possession.

Selden de successione apud Hebraeos, c. 20.

XI. By the Laws of England if a man dyed leaving issue divers Sons, the Lands descended to the Eldest; but a Jew dying, leaving issue divers Sons, after the Fine paid to the King, they all inherit Lands, Goods and Chattels in a kind

a kind of *Copercenary* *. So likewise by the Law of the Realm if a *Jew* dyed seized of Lands, his Wife could not by the *Common Law*, bring a Writ of Dower; yet she might bring a Plaint before the Justices assigned for the *Jews* in the nature of a Writ of Dower, and should there recover, nevertheless subject to answer the King a Fine, nay though the Husband was converted to the Christian Faith †.

* But that was by the establishment of the Justices appointed for the Jews.

† *Cok. 1. Inst. fol. 31, 32.*

Clauſ. 28. H. 3. m. 4. dorſo. Clauſ. 36. H. 3. m. 26. pro quadam Judea.

The power of Excommunication was granted the *Jews* to excommunicate any of their own Profession; but the same could not be done by them without Licence. H 3. m. 3.

XII. Notwithstanding all these Priviledges and indulged Liberties which were granted to them by those Kings from the Conquerour to that their Fatal year in 18 E. 1. yet they were in no other condition but most absolute Bond-slaves and exquisite Villains; for their names were inrolled in the Kings Exchequer for the *Jews*, and they confined to live and abide only in such places as those several Kings or their Justices assigned for their Custody, should prescribe and allot them, from which they might not remove without special Licence, but always be resident, that so the Kings Officers might on all occasions find both them and their Families, and then as often as the Kings pleasure was, were they translated from place to place, and not suffered to have any habitation but where they had a common Chest, and where Taxes were imposed on them, or debts were owing from them to the Crown, their Persons; Wives, Children, Infants, Families were imprisoned, and sent to remote places and Castles, nay banished, executed, and put to Fines and Ransoms upon all such occasions as those Kings thought fit, they were sold either person by person or in whole sale as Bond-slaves or Villains in gross by the King, and mortgaged to those who would accept them as a Pledge, or otherwise advance any Monies upon their Assignment. 35 H. 3. m. 6.

XIII. And that they might be distinguished from others, they were obliged always to bear a Badge and Table on their outmost garments, as well Females as Males, where-ever they rode or went, to distinguish them from Christians, with whom they were to have no intimate com.

2. Clauſ. 2 H. 3. m. 10. dorſ.

communion, nor could the Christians be Servants or Nurses to the *Jews* in any kind, their state and condition being such, that they were all of them meer Slaves and Servants to the King in one kind or other.

When they had entred the Realm, they were absolutely prohibited to depart without special Licence, the which they hardly and but seldom could obtain; and if they attempted it, the which they sometimes would do to avoid the heavy Taxes that were laid on them, they were imprisoned and put to severe Fines and Ransoms.

*Claus. 15. Joh.
memb. 13.
Fine 7 H. 3.
mem. 2. pars 1.
Ebor.*

XIV. As for their real and personal Estate, it was wholly at the disposal of the King; for he might seize all their Lands, Houses, Rents, Annuities, Fees, Stars, Mortgages, Debts, Goods and Chattels whatsoever, and sell, grant, release, and give them to whom he pleased at his pleasure.

*Claus. 5 Hen. 3.
m. 17. de dom.
Judiciorum.*

At their deaths their whole Estate, both real and personal, escheated to the King; neither could their Heirs or Executors, Wives and Kindred have or enjoy them without making Fines, Releases, and Compositions with the King for them.

*Claus. 7 Johan.
Reg. m. 26.
Claus. 9 Johan.
Reg. m. 5. d. 6.*

And when they had occasion to sue or implead any person upon any account, real or personal, they could not proceed till Licence obtained, which always was upon Fines made; and those very Actions after they were commenced he could stay, and the very debts which they prosecuted for, he might respite payment of Principal or Interest, and give what time he pleased, nay he could not only lower or lessen the summs mentioned in their several Charters, but he might release them for ever; and though the King might pardon or release a debt, yet he might notwithstanding revive the same. And those publick Chests, the common Repository of all their Fortunes, they often seized and sealed up the same, and disposed what of them they pleased to the Kings own use, notwithstanding their Charters and Grants of Priviledges, nay forced them sometimes to tax and distrain one another under pain of perpetual Imprisonment, Banishment, Confiscation of all their Estates, and the most severe Penalties that could be inflicted, they living purely under an uncessant and arbitrary will of those several Kings; and that which was the more to be admired, that if they turned Christians, they

** Claus. 35. H.
3. m. 5. d. 5.*

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immediately upon their Conversion forfeited all their Estates to the Crown. At length King *Edward* the First having sought all ways that might be to reform the exorbitant Usuries and Oppressions which they daily committed, did through the earnest solicitation of the Commons publish an Edict in Parliament for their total and universal Banishment, which accordingly was done, and the King at that time sent his Letters and Letters Patents to several Sea-Towns, reciting, That he had prescribed a certain time for their departure out of the Realm, commanding them not to do, nor suffer any wrong to be done them, but to grant them speedy passage at their own costs and charges. After which prefixed time, if they were found resiant within the Realm, they were hanged*, and some of the Rents and Profits of their Houses were disposed to pious uses, but all were generally seized into the Crown, and disposed and sold to the *English* by several Grants and Sales under the Great Seal of *England*.

*Hillar. An. 32.
H. 3. Rot. 9.
in the Ex-
chequer.*

*Cok. 2. Instit.
fol. 507.*

* *Matth.
Westm. Flor.
Hist. An. 1290.
part 2. fol. 238.*

Thus these People having by their extraordinary Usury, Extorsions, and Oppressions reduced themselves to be despicable, and then banished, and that by a people too with whom if they had continued in love and friendship, and improved their Fortunes by the Rules of moderation, they in all probability might have continued and flourished, they having from the several Kings from the Conquerour down to their Fatal year, as many large Patents of Liberties and Franchises granted them, as ever were granted by any Christian Prince or State since the extirpation of their Commonwealth.

*In the 20 year
of Ed. 1. there
endorsed
Charta de Ju-
daismo Litce-
Patentes de
domibus Ju-
deorum conce-
sis post eorum
exilium de An-
glia, above an
hundred par-
ticular Patents
of the Sale of
their Houses.*

But notwithstanding this, yet Commerce and Traffick having now taught them a more exquisite way of enriching themselves, than by that cruel and biting Trade of Usury, they have now got footing into the Realm, and do now flourish in as high a manner as of old, (though it is hoped not in that manner for which they justly procured their total banishment out of the same) and since time hath been so kind to them as to destroy those Rolls and Monuments of their former Cruelties and Oppressions, and where their Banishment was recorded, (there being no other footsteps of the same, nor of any other before 5 *Ed. 2.* to be found, they being totally lost; yet there are other Records that have sufficient Recitals of the

the same as well as History to evince the truth, if in the least contradicted) it is hoped that if they continue in the Realm, that they will by their constant actions consult and do such things as may stand with the Honour, Justice, and good of the Kingdom.

CHAP.

C H A P. VII.

Of Merchants.

- I. Merchandizing, the same is honourable and profitable both to Prince and State.
- II. The advantages that might accrue to Kingdoms, if the more Noble and richer sort applied themselves to the same.
- III. Of the first Institution of the Company of Adventurers.
- IV. Of the Institution of that in England to the Indies.
- V. Of the forming of that in Holland to those parts.
- VI. Of the forming the like by the most Christian King to the same parts.
- VII. Of the Advantages and Disadvantages considered, in reference to reducing them to Companies.
- VIII. How Merchants in England were provided for of old.
- IX. Of their Immunities settled by Magna Charta.
- X. Of Merchants-Strangers, whose Prince is in War with the Crown of England, how to be used in time of War, and the reasons why Merchants-Strangers ought to be used fairly.
- XI. Goods brought in by them, the Monies raised how to be disposed, according to the Statute of Imployment.
- XII. Merchant-Strangers made Denizens by Parliaments, or Letters Patents, to pay as before they were so made.
- XIII. What things requisite that make a competent Merchant according to Law.
- XIV. One Merchant may have an Account against his Partner, and if he dies, no Survivorship to be of the Estate belonging, or acquired in their Traffick.
- XV. Of the Immunities which they claim by the Custom of Merchants, in reference to Exchange.
- XVI. All Subjects are restrained to depart the Realm but Merchants.
- XVII. Prohibitory Laws bind Foreigners according to the Leagues of Nations.
- XVIII. The necessity and advantage that is incumbent on Merchants to preserve their Marks.

There are certain affairs which should be left to the poor and common people to enrich them, but there are others which they only can execute which are rich; as that at Sea by way of *Merchandizing*, which is the most profitable in an Estate, and to the which they should attribute more honour, than some do here at this day. For in all Estates they have thought it fitting to invite the Subjects by honour to the most painful and dangerous actions, the which might be profitable to the publick; this being

Præter mercaturæ usum Naves rei militari, & tutelam in mari contra externam vim reipub. inservire cæperunt, Aristot. 7. Polit. 6. Mare & classem in bello esse tutelam reipub. ait Tacitus 5. Hist. Class. Imperii munimenta vocant Atheniensium legati apud Thucydidem, lib. 1. Hist. Orat. ad Lacedæmon. fortunas Græciæ in

navium præsidio sitas fuisse prædicant, ejus rei mari lignei Themistoclis abunde fidem fecerunt, idem experientia satis hodie loquitur. Inde Cosmo Medicæo familiare fuit dictum, Non habendum potentem qui potentia terrestri, non simul etiam navalem haberet conjunctam. Et Hispanorum est adagium, Regnum sine portu esse sicut furnum absque igne : Præterquam quid navigationes cultui vitæ, & artium translationi Colonialium valetudine, & voluptati servunt.

being of that quality, that they should attribute more honours to those that deal in it : And if *Nobility* hath taken its foundation from the courage of men, and from their valour, there is certainly no vocation in the which there is so much required as in this; they are not only to encounter and strive amongst men, but sometimes against the four Elements together, which is the strongest proof that can be of the resolution of Man. This hath been the occasion that some have been of opinion, that they should open this door to Merchants to attain to *Nobility*, so as the Father and Son have continued in the same Trade, and to suffer Noble-men, who are commonly the richest in an Estate, to practise themselves (without prejudice to their condition) in this of Commerce; the which would be more honourable unto them than to be Usurers and Bankers, as in *Italy*; or to impoverish themselves in doing nothing but spend, and make consumption of their Fortunes, and never gathering or laying up.

II. Hence will grow many advantages both to the publick and private: To the publick, for that they that should deal in Commerce, having Means; Courage, and sufficiency for this Conduct, it would be far greater in the furnishing more Ships to Sea, and better armed, the which the State at need might make use of for the safety of the Publick, and would add to the reputation of the Nation in all parts, they knowing that an Indignity or Damage offered to such, would require satisfaction with a strong and powerful hand; the which they cannot do, who being poor, and having but small stocks, or what they borrow from Bankers, or are indebted for the Cargo which they send forth, have not the Courage to hazard themselves and their All in an enterprize that is great. Besides, such who have honour, riches, and courage, would keep up the reputation of their several Commodities, by the not lessening the Market, the which the poorer sort, to pay Customs, Freight, Bills of Exchange, and other contingent and necessary charges

charges, which accompanies the importing and exporting, are often forced to mortgage the Cargo to the *Bankers* at excessive *Usury*, or else to sell for ready Money, for an inconsiderable gain; nay, some rather than their wants be known, for ready Money will sell for loss: All which would be prevented, if such persons of value would apply themselves to a prudent management of the same; for whatsoever hazard they run, there would be more gotten by such in two Voyages, than the smaller sort in three or four Voyages, and by that means it would be the occasion of preventing many expences, or importuning their Prince with demands, nay, perhaps they might get more at Sea in one year, than in ten at Court. Besides, experience hath taught, and doth daily manifest, that where the richest have dealt in this of Commerce, it hath enriched both them and the State under which they lived; and at this day the Examples of the *Venetians*, *Portugals*, *Spaniards* and *Hollanders* have made it known unto us.

III. The consideration of which first gave light to that industrious Nation the *Burgundians*, to procure the Association or Incorporation by *John Duke of Brabant*, of that ancient Company of the Adventurers, Anno 1248. which were then called the Brotherhood of *St. Thomas Becket of Canterbury*; which being afterwards translated into *England*, was by *Edward the Third* confirmed, and by his Successors *Henry the Fourth*, *Henry the Fifth*, *Edward the Fourth*, *Henry the Sixth*, *Richard the Third*, and King *Henry the Seventh*, who gave them the name of Merchant-Adventurers, and from him successively hath their Charter been confirmed down to, and by his Sacred Majesty that now is; and as this Society is of ancient estimation, so is their Government very commendable.

IV. The Society of the Company, trading to the *East-Indies*, differs from others, both as in reference to the Persons and Members which are at this day many of the principal Nobility of *England*, as also for that their Adventurers run all into many Stocks, and is governed and carried all joyntly upon benefit and loss; they were incorporate Anno 1599. and since they surrendered their Charter, and accepted a new one, and are incorporated by the name of Governour, and Company trading to the *East-Indies*; their Adventurers run all into one general Stock,

and is governed and carried on upon benefit and loss; the same being at this day, according to the Subscriptions, about four hundred thousand pounds, which the several persons Subscribers may sell, transfer, and dispose of; but they can no ways take out the same: The *great Stock* may be increased, if the Company shall see occasion so to permit; but they are very cautious of the same, for that the greater the dividends, the more reputation the Stock bears, which above all things is to be maintained; however directly upon his own account, no person can have above ten thousand pounds Stock there, nor can he have a compleat title, till he is made a Free-man of that Society; their returns are very profitable, and of late very rich, and have many places of great importance in *India*, as *Mesopotam* on the Coast of *Cormandel*, *Bombay*, *Surat*, *Fort of St. George*, *Bantam*, &c.

V. The *Dutch* having found relief in their distress from the *British* shore, against their powerful Enemy, found also a pattern to carry on Commerce; they not being wanting in the imitating the Incorporation of a Company, trading to those Places which they possessed in the *East-Indies*; and therefore in the year 1602. leave was granted from the *States* to traffick into those parts before all others, during the space of one and twenty years, the which was granted them, in consideration of five and twenty thousand Florins, which they promised to pay to the *States* during the first ten years; thus reduced all into one Company, *Amsterdam* had one moiety, *Midleburg* in *Zealand* a fourth part, *Delph*, *Rotterdam*, *Horne*, and *Enchusen* had each of them a sixth part, the whole Stock of this Union amounting to six Millions of Livres, or six hundred thousand pound Sterling.

For the direction of this Trade, and the Interests of the Associates, they have established in either of those Towns, a certain number of Administrators, at *Amsterdam* twenty, at *Midleburg* twelve, in either of the rest seven; and if any one dies, the Chamber of the Place names three, of which either the *States General*, or the Magistrate of the Town chuseth one.

Those Chambers chuse seventeen among the Administrators, that is to say, *Amsterdam* eight, *Midleburg* four, *Delph* and *Rotterdam* two, *Horne* and *Enchusen* two; and the

the Seventeen are chosen alternatively, sometimes at *Middleburg*, sometimes at *North-Holland*, they which are called together to resolve joyntly of how many Ships, and of what Equipage and Furniture they shall make the Fleet, which they mean to send, and to what Port or Coast they should go. This Assembly is held six years together at *Amsterdam*, and afterwards two years at *Middleburg*, and then again at *Amsterdam*; by the Conditions of the Accord the Ships must return to the same Port from which they parted; and the Spices which are left at *Middleburg*, and other Chambers are distributed amongst them by the weight of *Amsterdam*, and the Chamber which hath sold her Spices, may buy from other Chambers.

By this Order* they have hitherto continued this Commerce with reputation, not as simple Merchants only, but as if they were Sovereigns, they have made in the Names of the *States*, Alliances with many of the Princes of those parts; as with the Kings of *Sian*, *Quadoen*, *Patam*, *Jabor*, the Heir of *Mataca*, *Bornean*, *Acbin*, *Sinnatra*, *Baretan*, *Jocotra*, and other Kings of *Jatta*; they have made themselves absolute Masters of the Island of *Amboyna*, but by what means?—Where they have a President who governs in their name; at *Banda* they have a Fort for a retreat, where they must deliver the Spices at a certain Price; in *Trinate* they have another a Mile distant from that of the *Portugals*; at *Magniene* they have three; at *Motjre* one; at *Gilolo* they have taken that which the *Portugals* have built; and indeed whatsoever either can, or may consist with their Interest in those parts, they have ingrossed, and by that means almost the Trade of the whole Spices of the *East*.

* There are now some variations.

VI. So likewise the most Christian King hath within few years established such another Trading to those *Eastern* Parts.

And in *England* we have several others, as that of trading to *Turkey*, that of *Africa* to *Guiney*, and several others, dividing the several Trades according to the Coasts and Places where they are appointed, forbidding them to intrench or incroach on each other; so likewise to all other his Majesties Subjects on severe Penalties.

VII. Now it is not the dividing of the Trade into Companies that can answer the expectation, but it is the dividing

viding the Trade into Companies, where the places may bear it; as that to the *Indies, Turkey, Hamborough,* and some others: But to some others, as the *Canaries, France,* or any of those places on this side the Line, it has been conceived the Trade will not answer it, but the same would be better distributed, either into the Trade of voluntary Associations, or single Traders; others perhaps would result into Monopolies, if incorporated; however the Standard rules, to know whether the Trade of the Place will bear a Company, or not.

It is Foreign Trade that is the main Sheet-Anchor of us Islanders, without which the Genius of all our useful studies, and the which renders Men famous and renowned, would make them useless and insignificant to the Publick; when Man has fathomed the bottom of all Knowledge, what is it, if not reduced to Practice, other than empty notion? If the Inhabitants of this Island were learned in all the Languages between the rising and setting of the Sun, did know and understand the situation of all Places, Ports, and Countries, and the nature of all Merchandize and Commodities, were acquainted with the Order and Motion of all the Stars, knew how to take the Latitude and Longitude, and were perfectly read in the Art of Navigation, to what purpose would all be, if there were no Foreign Trade? We should have no Ships to navigate to those Countries, nor occasion to make use of those Languages, nor to make use of those Commodities; what would this Island be without Foreign Trade, but a place of Confinement to the Inhabitants, who (without it) could be but a kind of Hermites, as being separated from the rest of the World; it's Foreign Trade that renders us rich, honourable, and great, that gives us a Name and Esteem in the World, that makes us Masters of the Treasures of other Nations and Countries, and begets and maintains our Ships and Sea-men, the Walls and Bulwarks of our Country; and were it not for Foreign Trade, what would become of the Revenue (as one hath ingeniously observed) from six to eight hundred thousand Pounds for Customs, and what would the Rents of our Lands be? The Customs would totally fail, and our Gentlemens Rents of chousands *per annum*, would dwindle into hundreds.

Les avantages de Commerce a la East-India.

VIII. Merchants in *England* were always favourably provided for by the *Common Law* of this Kingdom. By the ancient Laws of King *Alfred* it was provided, *De* fendue fuit que nul Merchant-Alien ne hantast Angleterre, foizque aux quater Foires, ne que nul demeurast in la terre outer quarante jours: *Mercatorum navigia, vel inimicorum quidem quaecunque ex alto (nullis jactata tempestatibus) in portum aliquem invehentur tranquilla pace fruuntur, quinetiam si maris acta fluctibus, ad domicilium aliquod illustre, ac pacis beneficio donatum navis appulerit inimica, atque istuc nautæ confugerint, ipsi & res illorum omnes angusta pace potiuntur.*

*Mirour, cap. 1.
Sect. 3.
Intr. leges
Eitel. cap. 2.*

IX. Again, by the Grand Charter of our Liberties, they are provided for in these words: *Omnes Mercatores nisi publice antea prohibiti fuerint, habeant saluum & securum conductum, exire de Anglia, & venire in Angliam, & morari, & ire per Angliam, tam per terram, quam per aquam, ad emendum vel vendendum sine omnibus malis tolentis per antiquas & rectas consuetudines præterquam in tempore guerræ. Et sint de terra contra nos guerrina, & tales inveniantur in terra nostra in principio guerræ, attachiantur sine damno corporum suorum, vel rerum, donec sciatur à nobis, vel à Capitali Justiciario nostro, quomodo Mercatores terræ nostræ tractantur, qui nunc inveniuntur in terra illa contra nos guerrina; & si nostri salvi sint, ibi alii salvi sint in terra nostra.*

*Magna Charta,
cap. 30.*

1. By which it is declared, that all Merchant-Strangers might be publickly prohibited to trade into this Realm, be they in Amity, or otherwise.

2. All Merchant-Strangers in Amity, except such as be so publickly prohibited, shall have safe and sure conduct in seven things.

1. To depart out of
2. To come into
3. To tarry in
4. By Water and Land to go in, and through
5. To buy and sell.
6. Without any manner of evil Tolls.
7. By old and rightful Customs.

} *England.*

*Addit Canon,
Mercatores,
quod non tantum de his qui temporariam in hostico moram agitant, intelligendum est, sed ut de subditis perpetuis; nam & eorum vita ab*

armis aliena: est ac sub hoc nomine continentur simul alii opifices & artifices quorum questus pacem amat, non bellum. Grotius de Jure Belli, lib. 3. cap. 11. §. 12.

X. But concerning such Merchant-Strangers, whose Prince is in War with the Crown of *England*, if they are found

* That is, the Keeper of the Realm in his absence.

Et in Republica maxime conservanda sunt jura Belli, Co. 2. Instit. fol. 58.

Rot. Parliam. 18 E. 1. fol. 4. num. 55.

Rot. Vascon. 18 E. 2. m. 21.

found within the Realm, at the beginning of the War, they shall be attached with a Privilege and Limitation, *i. e.* without harm of Body or Goods; with this limitation, until it be known to the King, or his Chief Justice *, how Merchants of England are used and intreated in their Country, and accordingly they shall be used in England, the same being *Jus Belli*. But for Merchant-Strangers that come into the Realm after War begun, they may be dealt withal as open Enemies, it being the Policy of England ever to entertain Merchant-Strangers fairly; in the 18th year of Ed. 1. in the Parliament Roll it is contained thus:

Cives London petunt, quod alienigeni Mercatores expellantur à Civitate, quia dicantur ad depauperationem Civium, &c. — Responsio — Rex intendit quod Mercatores extranei sunt idonei & utiles magnatibus, &c. & non habet Concilium eos expellendi. However, though great Immunities were granted them, yet they always found Sureties, that they should not carry out the Merchandize which they brought in.

XI. And at this day, if they bring in any Merchandize into the Realm, and sell the same for Monies, they are to bestow the same upon other Merchandizes of England, without carrying of any Gold or Silver in Coyn, Plate or Mass out, on forfeiture; the principal reason of this was as well to preserve and keep the Gold and Silver within the Realm, as for the increase of the Manufactures; and the same at this day extends as well to Denizens, so made by Letters Patents, as Strangers; however he may use the same in payment to the King's Leige People, without incurring the Penalty of the Statute of 4 H. 4. but yet in strictness of Law, ought not to receive * any Gold in payment.

† *Stat. 17 E. 4. c. 1. confirmed by 3 H. 7. c. 8. * 8 H. 6. c. 14. 11 H. 7. cap. 14. 22 H. 8. cap. 8. 1 Eliz. cap. 1. Co. 2. Instit. fol. 742.*

XII. All Merchant-Strangers that shall be made Denizens, either by the King's Letters Patents, or by Act of Parliament, must pay for their Merchandize like Custom and Subsidy, as they ought, or should pay before they were made Denizens.

Leg. unic. Cod. de nund. & Al. ceat. in Leg. mercis 65. & in Leg. mercis 207. de verb. signif.

XIII. Every one that buys and sells, is not from thence to be denominated a Merchant, but only he who trafficks in the way of Commerce, by Importation or Exportation; or otherwise in the way of Emption, Vendition, Barter, Permutation, or Exchange, and which makes it his living

to buy and sell, and that by a continued assiduity, or frequent Negotiation in the Mystery of *Merchandizing*: But those that buy Goods to reduce them by their own Art or Industry into other forms than formerly they wereof, are properly called Artificers, not Merchants: Not but Merchants may, and do alter Commodities after they have bought them, for the more expedite Sale of them, but that renders them not Artificers, but the same is part of the Mystery of Merchants; but persons buying Commodities, though they alter not the form, yet if they are such as sell the same at future days of payment for greater price than they cost them, they are not properly called Merchants, but are *Usurers*, though they obtain several other names, as *Ware-house Keepers*, and the like; but Bankers, and such as deal by Exchange, are properly called Merchants.

C. ejiciens 88. dist.

Paul. de Cassr. in Leg. eum ff. de Inst.

XIV. The Wares, Merchandizes, Debts or Duties that Merchants have as joynt-Traders, or Partners, shall not go to the Survivor, but shall go to the Executor of him that is deceased.

F.N.B. 117. B. 38 E. 37. Co. on Littlet. fol. 182. per Legem mercatoriam jus accrescendi inter Mercatores per beneficium commercii locum non habet.

If two joynt-Merchants occupy their Stock, Goods, and Merchandize in common to their common profit, one of them naming himself a Merchant, shall have an account against the other naming him a Merchant; and shall charge him as Receptor * *denariorum ipsius B. ex quacunque causa, & contractu ad communem utilitatem ipsorum A. & B. provenient sicut per Legem Mercatoriam rationabiliter monstrare poterit.*

* *Co. sup. Litt. fol. 172. lib. Intrat fol. 17. 18, 19.*

XV. And as the Law establishes security for their Estates, so it gives them other Immunities in their Commerce; for if one Merchant draws a Bill of Exchange upon another, be it in-Land or out-Land, (if it be by way of Exchange) the acceptance of the Bill by the party shall bind him to that party, to whose use the Money in the Bill is to be paid, and he may bring his Action in his own name, *per Legem Mercatoriam.*

Martin versus Boux, 1 Jac. B. R. 2. Cro. fol. 7.

And so it is, if a third person, that is a Stranger to the Bill, shall accept the same for the honour of the Drawer, it shall bind him as effectually, as if he upon whom the Bill was drawn had accepted it; and this by the Custom of Merchants.

Vide tit. Ex-change.

XVI. All other Subjects are restrained to depart the Realm,

*Mich. 12. &
13 Eliz. Dyer,
fol. 296. Pasch.
23. Eliz. fol.
375.*

Realm, to live out of the Realm, and out of the King's Obedience, if the King so thinks fit; but Merchants are not, for they may depart, and the same is no contempt, they being excepted out of the Statute of *5 R. 2. cap. 2.* And by the *Common Law* they might pass the Seas without Licence, though not to Merchandize.

19 H. 7.

*Tomlinson qui
tam vers. Henry
de Vale, Pasch.
36 Eliz. in the
Exchequer.*

XVII. It was once conceived, that those Laws which were prohibitory against Foreign Goods, did not bind a Merchant-Stranger, but it was ruled otherwise: For in the Leagues that are now established between Nation and Nation, the Laws of either Kingdom are excepted; and therefore as the *English* in *France*, or in any other Nation in Amity, are subject to the Laws of that Country where they reside; so must they of *France*, or any other Country be subject to the Laws of *England*, when resident here; and therefore if a *French-man* imports any Points, Laces, Belts, Hats, and the like, they are forfeited.

XVIII. The marking of Goods is of a great consequence, as in relation to the settling the property of the Merchandize in the right Owner; and in Courts of Justice, both the *Civil Law* and the *Common Law* hath a great respect to the same, therefore the use has been, that every particular Merchant hath his particular Mark appropriated to him; by which means, if the person is of any value considerable, as in relation to Commerce, his Mark is presently known.

*The Cutlers
of London do
give to each
Member a
particular
Mark, which
cannot be u-
sed or appro-
priated, with-
out a particu-
lar order and
leave of the
Company and
Party, and so
other Com-
panies. 2. Cro.
fol. 471.*

Every Merchant is to set down his Mark upon his Books of Accompt, wherewith his Commodities are marked; so Companies and Societies have their particular Mark: No Merchant ought to use another Mark, without leave first had of the Party whose Mark the same is; for as Flags are the Ensigns that give consufance of the Nation whose Ships they are, so Marks are to ascertain the Owners of their Property, without confusion or damage: And though to set the Mark of another Man alters not the Property, yet it may work such a detriment as may be very mischievous; and therefore by the *Common Law* of *England*, if *J. S.* shall maliciously set the mark of *J. D.* upon his Goods, to the intent *J. D.* shall or may be brought into any trouble, or put to any damage or charge, an Action of the Case will lie against *J. S.*

C H A P. VIII.

Of Factors.

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| <p>I. Factors, their qualifications generally considered, in reference to their employment.</p> <p>II. Of Commissions, and the words in the same, that qualifie them in their employment.</p> <p>III. Of Commissions to Factors that limit their actions.</p> <p>IV. Of a Factor that deals for several Merchants, of the Obligations that oblige, and not oblige each other.</p> <p>V. Of their power, considered in reference to the dispensing with the Debtors of their Principals.</p> <p>VI. Where the false Entry, or unfaithfulness of the Factor, subjects him to answer damage to his Principals; and of the like committed by the Principal, where to answer to the Factor.</p> | <p>VII. Of Goods remitted to Factors, and lost in their possession, who bears the misfortune.</p> <p>VIII. Bills of Exchange drawn on the Factor by the Principal, and accepted, but before day of Payment the Principal becomes Bankrupt, whether the same must be paid.</p> <p>IX. Of Freightage of Ships by a Factor, where he is obliged to see the same discharged.</p> <p>X. Of the general Rules to be used touching the Construction of their actions.</p> |
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I. **A** Factor is a Servant, created by a Merchant's Letters, and taketh a kind of provision called Factorage, such Persons are bound to answer the loss, which happens by over-passing, or exceeding their Commission; but a simple Servant, or an Apprentice can only incur his Masters displeasure. The Spaniard hath a Proverb, *Quien passa Commission, pier de Provision*; He that exceeds his Commission, shall lose his Factorage: But time and experience hath taught them to know better things; for now it is, *Subolca la paga, His Purse must pay for it.* The gain of Factorage is certain, however the success of the Voyage proves; and it is the prudence of Merchants to chuse honest and industrious Persons, for otherwise the Factor may grow rich, and the Merchant poor; the first being sure of his Reward, the latter uncertain of his Gain.

II. In Commissions they now generally insert these words: *Dispose, do, and deal therein as if it were your own*; by which the actions of the Factor are to be excused, though

though it turns to his Principals loss, because it shall be presumed he did it for the best, and according to his discretion.

III. But bare Commission to a Factor, to sell and dispose, will not enable him to trust, or give further day of payment; for in the due execution of his Authority, he ought on a Sale to receive *quid pro quo*, and as he delivers one to receive the other; for otherwise by that means, as they may trust six Months, they may trust sixteen years: Nor by the virtue of that Clause, of *Doing as if it were their own*, may they trust out to an unreasonable time, as ten or twenty years instead of one, two, three Months, which is the customary time for the like Commodities: And so it was adjudged, where one had remitted Jewels to his Factor in *Barbary*, who disposed of the same to *Mulleshack* the Emperour, for a Sum certain to be paid at a time, which being elapsed, the Factor not obtaining it, was forced to make the same good to his Principal.

IV. Again, one and the same Factor may act for several Merchants, who must run the joynt risque of his actions, though they are meer Strangers to one another; as if five Merchants shall remit to one Factor five distinct Bales of Goods, and the Factor makes one joynt Sale of them to one man, who is to pay one moiety down, and the other at six Months end; if the Vendee breaks before the second payment, each man must bear an equal share of the loss, and be contented to accept of their dividend of the Money advanced.

But if such a Factor draws a Bill of Exchange upon all those five Merchants, and one of them accepts the same, the others shall not be obliged to make good the payment.

V. And as the authority and trust reposed in Factors is very great, so ought they to be provident in their actions for the benefit of their Principals; and therefore if Factors shall give time to a man for payment of Monies contracted on Sale of their Principals Goods, and after the time is elapsed, they shall sell Goods of their own to such persons for ready Cash (leaving their Principals unrecovered) and then such Men break, and become insolvent, the Factor in equity and honesty ought to make good the losses, for they ought not to dispence with the non-payment of
their

7 Jac. B. R.
Rot. 416. Bar-
ton & Sad-
docks. Bollf.
1 part 103.

Mich. 17 Jac.
C. B. Van.
Heath versus
Turner, Winch.
24, 25.

their Principals Monies, after they become due, and procure payment of their own to another mans loss; but by the Laws of *England* they cannot be compelled.

VI. Yet if Goods are remitted to a Factor, and upon arrival he shall make a false Entry at the Custom-house, or land them without the Customer, whereby they shall incur a seizure or forfeiture, whatsoever the Principal is endangered, he must inevitably make good, nor will such general clause help him as above: But if a Factor makes his Entry according to the Envoice, or his Letter of Advice, and it falls out the same are mistaken, if the Goods shall be lost, yet the Factor is discharged.

And as fidelity, diligence, and honesty are expected from the Factor, so the Law requires the like from the Principal, judging the act of one to be the act of the other; and therefore if a Merchant shall remit counterfeit Jewels to his Factor, who sells and disposes them for valuable Considerations, as if they were right, if the Factor receives any loss or prejudice thereby, by Imprisonment, or other Punishment, the Master shall not only make good the damage to the Factor, but also render satisfaction to the party damnified: and so it was adjudged, where one *How* was possessed of three counterfeit Jewels, and having Factors in *Barbary*, and knowing one *Southern*, a Merchant, was resident on the place, consigns those Jewels to his Factor, who receiving them, intreated *Southern* to sell those Jewels for him, telling him that they were good Jewels; whereupon *Southern*, not knowing they were counterfeit, sold them to the King of *Barbary* for eight hundred pounds (they being worth really but one hundred pounds) and delivered the Money to the Factor, who remitted the same to *How*; the King of *Barbary* not long after finding himself cozened, committed *Southern* to Prison till he repaid the eight hundred pounds. Whereupon *Southern* coming for *England*, brought his Action against *How*, and had Judgment to recover his damage; for the Principal shall answer for his Factor in all cases where he is privy to the act or wrong: And so it is in Contracts, if a Factor shall buy Goods on the account of the Principal (especially if he has used so to do) the Contract of the Factor will oblige the Principal to a performance of the Bargain.

Levison versus Kirke, Trin. 7. Jac. in B. R. Lane's Rep. 65.

Hill 25 Jac. B. R. Cro. 2. part, 490. Bridgman 126, 127. Popham 143. not resolved in that Book.

Hill. 43 Elix. B. R. Petty's Case, Goldsbr. fol. 137.

VII. When

* *Southel's
Case, Coke, lib.
4. fol.*

VII. When Factors have obtained a *Provenue* of profit for their Principal, they must be careful how they dispose of the same, for without Commission or Order they must be responsible. Goods remitted to Factors, ought in honesty to be carefully preserved, for the trust is great that is reposed; and therefore a Factor robbed in an Account brought against him by his Principal, the same shall discharge him*. And so it is if a Factor buys Goods for his Principal, which afterwards happens to be damnified, the Principal must bear the Misfortune: But if a Factor shall dispose of the Goods of his Principal, and take Money that is false, he shall there make good the loss; yet if he receives Monies, and afterwards the same is by Edict or Proclamation lessened in value, the Merchant, and not the Factor, must there bear the loss.

Again, in Letters of Credit, the Factor must be sure to see, whether the Commission is for a time certain, or to such a value, or not exceeding such a Sum, or general, in which he must have a careful Eye.

*Quare, if equity
may not re-
lieve in such
case.*

VIII. A Merchant remits Goods to his Factor, and about a Month after draws a Bill on him, the Factor having Effects in his hands, accepts the Bill, then the Principal breaks, against whom a Commission of Bankrupts is awarded, and the Goods in the Factors hands are seized; it has been conceived, the Factor must answer the Bill notwithstanding, and come in a Creditor for so much as he was enforced by reason of his acceptance to pay.

IX. If a Factor enters into a Charter-party with a Master for Freightment, the Contract obliges him; but if he lades aboard generally the Goods, the Principals and the Lading are made liable, and not the Factor, for the Freightment.

The Principal orders his Factor, that as soon as he hath loaded (he having Monies in his hand) to make an Assurance on the Ship and Goods, if the Ship happens to miscarry by the Custom of Merchants, he shall answer the same, if he hath neglected his Commission; so it is, if he having made an Assurance, and loss hath occurred, he ought not to make a Composition without orders from his Principal.

X. Generally the actions of Factors do depend on Buying, Selling, Freightment, and all other the Heads that have been treated

treated in the Second Book, by which their employment is universal in Matters Maritime and of Commerce; and the questions which would arise touching the same, if treated on, would be *in infinitum*: However these are to be the Standard-rules which should govern their actions, *viz.* honesty, faithfulness, diligence, and observing of Commission, or Instructions, which being considered, and weighed by those that shall be Judge of their Actions, a right understanding and determining of the matters arising between them and their Principals, would soon be ended.

But those sorts of Factors that have wanted those things, seldom or never render any other account, but long and tedious Chancery-Suits, by which they not only have endamaged their very Trade, but seek to marry their Principals to a double affliction, by obliging them to sue either a Beggar, or that which is worse, a naughty man.

On the other hand, Factors that behave themselves worthily and prudently in the service of their Principals, ought after their tedious service be numbered amongst those that justly challenge that worthy denomination of *Merchant*: And such was he who never made breach of Commission in the service of his Principal, but once; that was, when Wines were committed to him to dispose of, but the price (by reason of a glut) fell, advice being given to the Principal of the same, who immediately in passion writes to his Factor to take a hammer and knock out the heads; but the Factor considering (that leave must be given to losers to speak) knew better things, and kept the Goods, sold them for their full value; and when Accompts were to be made, instead of bringing to the Accompt of Wines, their heads knock'd out *per order*, worthily brought *per contra*, sold at their intrinsic value. Such faithful Ministers, I say, justly deserve that of our Saviour; *Well done*, &c. and to be no more called Factors, but Merchants.

CHAP. IX.

Of the Laws of Nature and of Nations.

- I. Of the variety and contrariety of human Actions, and from whence they spring.
- II. Of the difficulties that happen in the obstructing our Inquisition in finding that which is lawful.
- III. Humane Laws from whence they flow, and wherefore the Laws of Nature are above ours.
- IV. No man naturally more a Judge than another of Natures Laws.
- V. Natures Laws are instituted for inward goodness and virtue, but State-Laws for quiet and repose.
- VI. Of punishment required by Kings against those that violate the Laws of Nature or Nations, though the same touch not them, nor their Subjects, and of punishing an equal.
- VII. Of punishing an equal, where that right fails, and the reasons of the same.
- VIII. Subjects ought not to seek Justice in the Territory of another Prince, but in their own, unless the Defendant become Fugitive.
- IX. Of Kingdoms equal in Power cannot be commanded, but entreated, may be to execute the Judgment of another by the Law of Nations.
- X. That such power of executing the Judgments or Decrees of any Foreign Nation, extends not to those of Life or Honour.
- XI. Of executing the Judgments given in a Kingdom absolute, in another that is annexed by Conquest; and of the difference of that, and one by Union.
- XII. Where that right fails in Plantations, and the reasons of the same.

I. **P**Lain reason shews us, that Natural and Mathematical Causes have more certitude than Civil; for Nature is always uniform and alike in its operations: Hence fire always burns, and never wets; a stone in the Air naturally tends downwards, and never stays in the middle. In Mathematical Causes, ordinarily the forms are such, as have no middle interposed, as between even and odd; there is no *medium parti participationis*, between a right line and a crooked; there is no middle sort of line; thus two and two always make four.

II. But civil and human actions proceeding from a mutable and various Principle (the Will *) cannot always be alike or uniform: And besides the Will within, humane Actions without, are subject to different Circumstances, and to infinite Encounters; by reason of which their excessive

* *In quid naturale sit spectandum in his quæ bene secundum naturam se habent, non in depravatis.*
Arist. Polit.
1. 5.

cessive number, they cannot be foreseen while Men are making Laws: Hence we may understand wherefore it is said, *Omnis definitio in jure est periculosa*; and that *summum Jus* at some time may be found *summa injuria*; as to render a Man his Sword, when he is actually mad, &c. And as Circumstance hath power to change the matter, so in the form of the Action, it leaves in the middle a latitude, sometimes inclining to one extreme, sometimes to another.

For Example, betwixt that which by precept we are commanded ever to do, and that which we are commanded never to do, is placed that which is lawful for us now and then to do, or not to do, in matters of our own right so far as they seem expedient, or not expedient for us: Thus *Joseph* is called a just Man, because he thought of divorcing himself from *Mary*, though upon circumstances he would not, &c. But that which perplexes us all here is, that this *licitum* leans sometimes more to the one hand, sometimes more to the other, sometimes more to that which is absolutely good, sometimes more to that which is absolutely bad; from whence grow scruples and doubts, whether in such twilight we really participate more of light than of darkness, that is, more of good than of bad.

III. Humane Laws grow most out of these middle things, *ex mediis licitis*; and upon right examination we find, that a man hath nothing else to dispose, for we (poor subordinate Vessels) cannot so much as deliberate *de absolute debitis*, and *absolute illicitis*, for they were in force before Man, Prince, or People were in being, and God himself cannot now alter them, they flowing intrinsically, either from his Sanctity, Wisdom and Justice, as he is a Creator and Governour; or else they flow from Nature, whose rule (according to Gods making it by that which is in himself) is right reason and honesty. This uprightness of Nature, together with that obligation we have to be subject to it, was not a moment after us, and therefore we could not determine any thing about it; for which cause we have not a legislative Power to alter or diminish any of Nature's Laws.

IV. *S. Paul* tells us, of those who without any after knowledge of God's revealed Will or Laws to man, were condemnable

Non ideo id Deum velle, quia justum est, sed justum esse, (that is due in Law) quia Deus voluit.
Anaxarchus apud Plutarchum in Alexandro.

Vasqu. 11. Controv. 54. 4. Grotius de Jure Belli ac Pacis, l. 1. c. 1. S. 14.

by those of Nature alone in the punishing the breakers thereof. No man is naturally more a Magistrate than another, otherwise what meant Cain, when after his Murder he cried, *Whosoever shall find me, will kill me?*

V. And though humane Laws remember us of those things, yet it is not as if they gave their original and primary force of obliging; yea, reason of State is not busied so much about inward Piety and Vertue, as it is about public quiet and repose, or those actions which regard another mans receiving right or wrong: And hence it is that great prodigality is not so severely punished as a little robbery; and that *malus homo potest esse bonus Civis*, the reason is, because though he may do himself wrong in his own rights, yet he may always do other men right in theirs; neither is there any clear reason, wherefore those lesser sins and impieties should be punished by any but God, who is wisest to know them, justest to weigh the merit of them, and powerfullest to punish them.

This is the state of God's, and of Nature's Laws, to which we are all equally obliged, but our floating and circumstantiated Laws are only to give a rule for an equal and mutual community in things, which God and Nature gave us to dispose of as we would our selves.

VI. Hence it is, that Kings, and such as have equal power with Kings, have a right to require Punishment, not only for Injuries committed against themselves or their Subjects, but for them also that do not peculiarly touch themselves, whatsoever the persons that do unmanly violate the Law of Nature or of Nations, for the liberty by punishments to provide for humane Society (as hath been already mentioned) was in the hand of every Man; but after Commonwealths and Courts of Justice were ordained, it resided in the hand of the highest Powers, not properly as they are over others, *but as they are under none*: For subjection to others have taken away that right; yea, so much more honest it is to vindicate other mens injuries than our own, by how much more it is to be feared, that a man in his own by too deep a resentment may either exceed a measure, or at least infect his Mind; however, this right of punishing an equal remains still in those places where the people remain as in great Families, and not in Cities, or under some Government; and there-
fore

fore those that have now Possessions of any parts of the New World, or *American* Isles, till they have either voluntarily submitted to a Government, or put them and their discovery into the hands or protection of some Prince that may exercise power, there remains the old and natural right of punishing for offences: So likewise where persons shall be assaulted by Pirates on the Seas, if they be overcome, they may be immediately executed by the Law of Nature; for otherwise there would be a failure of power to punish such: besides, the old natural liberty remains in all places where are no Judgments; so where they are taken and brought to a Port, and the Judge openly refuses the Tryal of them, or that the Tryal of them cannot be had, without an apparent detriment and loss to the Captors, Justice may be done upon them by the Law of Nature.

Vide Chap. Piracy, §. 11, 12.

Leg. extat. D. quod metus.

VII. Two Pirates resolving to assault and rob the next Vessel they meet with, (not knowing each others condition or design) encounter, and the one happens to be overcome by the other; the question is now, whether the above-mentioned right so far remains, as that the stronger may execute him whom he hath overcome? Right Reason dictates, that the evil-doer may be punished, not who should punish him; but that Nature sufficiently sheweth, that it is most convenient to be done by him that is Superiour; yet doth it not demonstrate this to be necessary, except Superiour be taken in that sense, that the evil-doer be thought to have made himself thereby inferiour to any other, and to have as it were degraded himself from the order of Men into the number of Beasts subject to no Man, and such are Pirates, who have no other denomination but Night-wolves, or Beasts of Prey. By Nature it is ordained, *That the better command the worse*: And Aristotle saith, *The worse are provided for the use of the better, as well in Naturals as in Artificials*. It follows hence, that at least a guilty person ought not to be punished by another equally guilty, to which purpose is that Saying of Christ, *Whoever of you is without sin (that is such sin) let him throw the first stone*. Pertinent is that saying, *The Sentence can have no authority, where he that judgeth is to be condemned*: From whence it follows, that the right of punishing in such case at such time ceases.

Qui non reddit faciendo quod debet, redder patiendo quod debet Philo, peccare dnm festinatis, ad penas ferendas festinatis.

Arist. 7. Pol. 14.

VIII. On the other hand, Subjects that have just cause of Action, and inhabit under their own Sovereign, ought not to wave his Justice, and fly into the Territory of another, but ought to seek it in their own, unless the Defendant becomes Fugitive. One *Richard Hieron* being a Merchant of *London* and Leige-man of the King, and born in *England*, commenc'd a Suit against *J. Walden* Major of the Staple of *Calice* and other Merchants of the Staple, caus'd them to be arrested in *Flanders* in the Court of the Duke of *Burgundy*, held in *Bruges*, for certain Injuries suppos'd by them to be made within the Jurisdiction of the King of *England* at *Calice*, and after the Defendants did appeal to the Parliament at *Paris*, and were there dismiss'd by a Judicial Sentence, for that they had no Cognizance or Ground to inquire or examine matters committed within the Jurisdiction of the King of *England*, and by his Subjects there inhabiting in a Foreign Court, the Record does make mention, that this was an act so derogating from the Law, and of so high a Contempt, that it was enacted, *Que brieve de Proclamation issira, luy commandant a surcealer son dit actions, & que s'il ni apyes sue les dits Defendants hors del Realm d' Angleterre par aucun matter determinable under the Jurisdiction and Obedience of the King of England ou l'on il adjurisdiction, the Judgment given—donque il serra, &c.* he shall be put out of the Protection of the King of *England*, and forfeit all his Lands, Tenements, Goods, and Chartels, and that no Pardon shall be to him available.

Act. Parl.
17 E. 3. num.
26. cited in
Rolls Abridg-
ment, tit. Pre-
rogative. fol.
176.

IX. Yet Kingdoms which are equal in power, and having no dependance on each other, cannot be commanded nor corrected of another; but if there be a question, to execute the Decree or Judgment of one in the Territory of the other, there may issue forth a Commission of Entreaty under the Seal of that Court where the Judgment was given, or at least under the Great Seal of the Prince, directed to the Judges in that place where the Defendant is resident, and the Judge to whom the said Commission is directed may award Execution, according to the Laws of Nations: And so it was adjudged, where one having recovered a Debt before the Governour of *Freisland*, the Defendant upon that fled for *England*, the Governour, at the request of the Plaintiff, issued forth his Commission of Request,

Request, directed *Omnibus Magistratibus infra Regnum Angliæ*, & *Jac. in B. R. rogans*, to make Execution of the said Judgment; upon which the Judge of the Admiralty in *England* issued forth an Execution of that Sentence, and the Defendant was taken, upon which he brought his *Habeas Corpus*, and adjudged the Sentence well executed by the Laws of Nations, and according to the *Common Law* of this Realm.

So likewise if a *Dutch-man* takes up Goods at the Port of *London*, and gives a Note under his hand for the payment of the same, and then flies into *Holland*, the Vendor may apply himself to the *Lord Mayor* of *London*; and upon proof of the delivery, and the Sale of the Goods, the *Lord Mayor* making a Certificate of the same, and sending it under the City-Seal directed, as above, they of *Holland* will and do execute the same upon the Party.

Herein this last Case differs from the first; for by the former, if there should fall a question about the interpretation of the Judgment or Sentence, the same cannot be done, for they are not to examine the same; and the reason is, lest the Stranger be induced at another time to do the like, and so dissolve the Judgments whereof they should demand the Execution, the which would be done more through jealousy of the State, than for any injustice in them: Besides, the Judgments or Sentences, which are matters of Record, and of the greatest security in a Kingdom, the presumption that they were justly given, shall always be understood.

X. But in the latter the same may be examined, that is, the Merchant may be heard as to his legal defence, either to the lessening or discharging the debt or damage, but against the testimony certified, no objection can be made, but the same is admitted as legally proved.

But if there be a question of honour or life, there they may not execute the Judgments of Foreign Judges, especially if they have not known the merit of the causes or seen the Informations, or heard the Witnesses; but more especially in *England*, for there can in no respect whatsoever the life of a man (let his offence be never so heinous) be brought to punishment without a legal Tryal *, and that by the producing of Witnesses *viva voce* to his face; yet Princes for the respect they bear each other, and for the Good of Justice, though they cannot at the bare re-

* *Coke 4. In-
stit. fol. 32.*

Soto de Just.
 & Jure, l. 3.
 qu. 1. Art. 7.
 Satis judica-
 mus esse paucos
 aliquos mala
 ferre, quam
 immensam
 multitudinem,
 Zonaras.
 * Pasch. 24.
 Car. 2. in B.R.
 in Hibern. in-
 ter Warde and
 Moor.

quest of the Judges of another Prince, put them to death; yet they may for exemplary punishments (which ought to be made upon the places where the fact was committed) yield the natural Subject to his natural Prince, unless the Prince to whom the Fugitive is fled, finds that he is unjustly pursued, for in such cases he is not bound to yield them; yea, he is forbidden by the Law of God to restore a bondman, which is fled into another man's house, to avoid the fury of his Master.

XI. And as the same is in cases Foreign, so likewise in those Estates that are under the *Crown of England*; and therefore if a Man recovers against * *J. S.* in the Kings Bench in *England*, and then the Defendant flies over into *Ireland*, the Judgment may be certified over into the *Chancery* in *Ireland*, and they may by *Mittimus* send it into the Kings Bench there, and they may award execution, or otherwise the party may bring his Action of Debt on the same; so the like has been done for Decrees given in the *Chancery* in *England*, which have been exemplified under the Great Seal, directed to the Kings Lieutenant, for the putting the same in execution there; but in no case a Judgment given in *England* may be certified over under any other Seal, but that of the Great one.

But in *Scotland* it is otherwise; for that is a Kingdom absolute, and not like *Ireland*, which is a *Crown* annexed by *Conquest*, but the other is by *Union*; and though they be united under one Prince *ad fidem*, yet their Laws are distinct, so as if they had never been united; and therefore the execution of the Judgments in each other, must be done upon Request, as above, and that according to the Laws of Nations.

XII. But in *Colonies* or *Plantations*, which are reduced into the condition of great Families, have not this Right of Requesting, for they are governed by the Laws prescribed by the Sovereign of the same, who may set Jurisdictions, and make them places privileged not to have the persons attached or arrested in any other places, but within their own bounds; so likewise upon their first forming or Institution, may so declare that for any Debt or Contract made or done in any place but in that of the same *Plantation*, they shall not be impleaded; and therefore in *Virginia* at this day, if a Man contracts a debt in *England*,
 flies

flies to the same, he cannot be there impleaded: But if a man takes up Goods, and carries the same over thither, there he may be sued in the place; so likewise if it can be proved he carried over the Money borrowed, and this amongst others of the Laws and Constitutions of those Plantations, is preserved inviolably, the same being as it were a pledge and general safety, which is given to those Inhabitants that shall resort thither, and there plant themselves for the good of the place; and although those that thither fly, by reason of great and unreparable losses, have contracted Debts far beyond their ability to satisfy, a failure of which, in strictness of Law, may (if the Creditor pleases) oblige their Bodies to Imprisonment; yet doth it not thence follow that the same ought to be exacted; for though the Carcass of man may gratify the Revenge of the Creditor, yet it never can pay the debt; wherefore if those ends by themselves in a moral estimation be not necessary; or, if other ends on the opposite part occur, not less profitable or necessary; or, if the ends proposed by Imprisonment may be attained another way, it will then follow that if there be nothing of obligation on the Debtors part, to render himself a Prisoner to the Creditor, that then if the same can or may be avoided by flight, the same in conscience may be done; according to that of Cicero *, *It was not fit perhaps to dismiss him being brought to Judgment, but that he should be inquired after, and brought to Judgment, was not necessary.* * *Ad Quintum, Trah. 1. 21.*

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